

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

DAVID ZINK, <i>et al.</i> ,	}	Case No. 12-4209-CV-C-BP
Plaintiffs,		
v.	}	
GEORGE A. LOMBARDI, <i>et al.</i> ,		
Defendants.	}	

THIS IS A CAPITAL CASE

**Execution scheduled for
12:01 a.m. Feb. 26, 2014**

**PLAINTIFF MICHAEL TAYLOR'S MOTION FOR
STAY OF EXECUTION
BASED ON ABSENCE OF LAWFUL MEANS OF EXECUTION**

Plaintiff Michael Taylor herein moves the Court for a stay of his execution, which is scheduled for 12:01 a.m. on February 26, 2014, based on there being no means of carrying out the execution lawfully.

Missouri's execution protocol uses compounded pentobarbital. The state's supplier of that drug has not provided the dose for Taylor's execution and decided yesterday it will not do so. (Exhibit A)

Missouri has identified no lawful means of executing Taylor next week. Any pentobarbital Missouri previously acquired is now expired. Though Missouri has indicated it has midazolam and hydromorphone, its execution protocol does not permit administration of those drugs; even if it did, Taylor would warrant a stay because those drugs have already inflicted unconstitutional pain and suffering in an execution and the states using them have thus temporarily halted executions. In any event, switching the protocol or the pentobarbital supplier now – a week before the scheduled execution – would violate Taylor's right to due process of law.

At this time, there are no lawful means of going forward on February 26th.

ARGUMENT

There are No Lawful Means of Carrying out an Execution on February 26th

Missouri has no usable pentobarbital and it may not switch to midazolam and hydromorphone, which cause unconstitutional pain and suffering, or make any other changes at this late date without violating Taylor's right to due process.

A. Missouri Has No Usable Pentobarbital

When deposed on January 15, 2014, defendant Dormire said Missouri had 10 grams of compounded pentobarbital in its possession. (Exhibit B at 105) That supply expired by February 15, 2014 – at the latest – because it had an expiration date of 30 days after being compounded, and it was compounded sometime before Missouri obtained it. (Exhibit B at 106)

On February 13, 2014, Governor Nixon responded to litigation Taylor had brought against the pharmacy that supplies Missouri with its pentobarbital. The governor said “the Department of Corrections is prepared to carry out the execution on February 26th.” (Exhibit C)

Yesterday, however, Taylor and the pharmacy settled their litigation based on the pharmacy affirming it had not provided any drugs for Taylor's execution and agreeing it will not do so. (Exhibit A)

The media speculated that Governor Nixon's comment on February 13th might have referred to the fact that Missouri has a supply of midazolam and hydromorphone. (Exhibit C)

B. Missouri May Not Switch to Midazolam and Hydromorphone

The midazolam-hydromorphone combination has been used in only one execution, and it caused unconstitutional pain and suffering.

Ohio executed Dennis McGuire on January 16, 2014, injecting midazloam and hydromorphone into him at 10:27 a.m. At 10:31 a.m., “his stomach swelled up in an unusual way, as though he had a hernia.” Between 10:33 a.m. and 10:44 a.m., “he struggled and gasped audibly for air.” “Over those 11 minutes or more he was fighting for breath, [a witness] could see both of his fists were clenched the entire time.” “Towards the end, the gasping faded into small puffs of his mouth. It was much like a fish lying along the shore puffing for that one gasp of air that would allow it to breathe.” (Exhibit D) “The execution process took 24 minutes, and [] McGuire appeared to be gasping for air for 10 to 13 minutes. ‘He gasped deeply. It was kind of a rattling, guttural sound. There was kind of a snorting through his nose. A couple of times, he definitely appeared to be choking.’”

(Exhibit E)

The duration of McGuire’s gasping and writhing far exceeded the predictions of even his lawyers, who had argued “McGuire will experience the agony and terror of air hunger as he struggles to breathe for five minutes after Defendants intravenously inject him with the execution drugs.” *In Re: Ohio Execution Protocol Litigation*, S.D.Ohio No. 11-1016, Docket No. 383 at 1.

Ohio had dismissed this possibility, which in fact came to pass, by arguing that “people who stop breathing due to the effects of an opioid, but who do not lose consciousness, do not perceive this as uncomfortable.” *Id.*, Docket No. 385 at 13. Ohio’s expert, Dr. Mark Dershwitz, had agreed: “They do not have a sense of difficulty breathing. . . . They don’t care.” *Id.* (quoting deposition). Dr. Dershwitz is the state’s expert here too.

The risks of repeating an unconstitutional execution require further review

of the midazolam-hydromorphone combination before it is used again, as Ohio and the only other state contemplating its use – Louisiana – have recognized.

On February 7, 2014, Ohio Governor John Kasich granted an eight-month reprieve to the man next scheduled to be executed by midazolam and hydromorphone so the state can properly study that combination, and McGuire’s execution, before deciding whether to proceed. (Exhibit F)

Likewise, on February 3, 2014, Louisiana agreed to a 90-day stay for a man facing execution by midazolam and hydromorphone; both sides agreed the execution “should be delayed to further review the drug protocol.” (Exhibit G)

Defendants here have already expressed their opposition to midazolam and hydromorphone. When asked whether Missouri would use that combination on Herbert Smulls, who was executed last month, lead defendant Lombardi said: “I’m testifying right now to tell you that will not be the case. We will not use those drugs.” (Exhibit H at 21) Indeed: “There will be [no] use of it in an execution.”¹ (Exhibit H at 21) Moreover, when defendant Dormire was asked about possibly switching to that combination for Smulls’s execution, he noted the decision was Lombardi’s but opined that doing so at that point would be “awfully quick”— and that was 14 days before Smulls’s date. (Exhibit B at 147)

It is indeed “awfully quick” to inform a defendant of the manner of his execution 14 days ahead of time; it would be unconstitutional to do so here, just one week out, as that would deny Taylor meaningful notice of – and opportunity to challenge – the state’s plan for ending his life.

¹ The court reporter accidentally omitted the “no” from that sentence, as reflected by the follow-up question plaintiffs’ counsel then asked: “Why will there be no use of it in an execution?” (Exhibit H at 21)

C. Taylor's Right to Due Process Precludes Any Changes Now

As plaintiffs have alleged in Counts VII and VIII of their Second Amended Complaint, defendants' constant and last-minute changes to the execution protocol – not to mention defendants' ongoing failure to meet their discovery obligations – violates plaintiffs' constitutional right to due process.

Missouri may not take Taylor's life without due process of law, meaning he has the right to meaningful notice of – and an opportunity to challenge – Missouri's plan for executing him. Notice is a means “to apprise the affected individual of, and permit adequate preparation for, an impending ‘hearing,’” *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978), during which he has “an opportunity to present [his] objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985) (“The opportunity to present reasons . . . why proposed action should not be taken is a fundamental due process requirement.”). “If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented.” *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972). *See also Mullane*, 339 U.S. at 314 (“The notice must be of such nature as reasonably to convey the required information, and it must afford a reasonable time for those interested to make their appearance.”) (citations omitted).

If Missouri were to change its protocol now and still seek to execute Taylor a week from now, he would have no meaningful notice of – or opportunity to challenge – the protocol. Likewise, the courts would have no time to meaningfully adjudicate the lawfulness of the new approach. Courts have underscored the

importance of giving a defendant the ability to meaningfully challenge the proposed method of execution. *See Arthur v. Thomas*, 674 F.3d 1257, 1262 (11th Cir. 2012) (per curiam) (“[T]he district court committed reversible error in dismissing Arthur’s Eighth Amendment claim without any opportunity for factual development, including discovery between the parties.”); *Reynolds v. Strickland*, 583 F.3d 956, 957 (6th Cir. 2009) (granting stay where “serious and troubling difficulties” during past executions raised concerns over the “competence of the lethal injection team”); *Cooey v. Kasich*, 801 F. Supp. 2d 623, 655 (S.D.Ohio 2011) (granting stay where there was evidence of “a troubling pattern of disregarding the very protocol that is supposed to control and provide safeguards for the execution process”); *Moeller v. Weber*, 2011 WL 288516 at *1 (D.S.D. 2011) (refusing to curtail “discovery concerning the plan for carrying out executions in light of the shortage of sodium thiopental”); *Morales v. Cate*, 2010 WL 3835655 at *3 (N.D.Cal. 2010) (granting stay where condemned inmate raised questions about “the selection and training of the execution team, the mixing and delivery of the drugs used in executions, and the adequacy and accuracy of execution records”); *Chester v. Beard*, 657 F. Supp. 2d 534, 542-454 (M.D.Pa. 2009) (holding that condemned inmates’ allegations of inadequately trained personnel and inadequate safeguards, if true, would demonstrate a substantial risk of serious harm, and giving inmates a chance to factually develop their claims); *Thorson v. Epps*, 2009 WL 1766806 at *1-*2 (N.D. Miss. 2009) (denying motion to dismiss condemned inmates’ allegations of executioner incompetence, which, if true, “plausibly would entitle him to relief,” and noting importance that “the factual record had been completely developed”).

Plaintiffs sued in May 2012, and defendants removed this case to this Court on August 1, 2012. In the year-and-a-half since, there has been no final ruling on the merits of plaintiffs' challenges to Missouri's execution protocol. The protocol initially called for propofol; now, compounded pentobarbital is the drug. If over 18 months of litigation did not yield a ruling on the legality of those methods, the lawfulness of using midazolam and hydromorphone cannot be finally adjudicated in one week. Moreover, the evidence that already exists as to that method – the McGuire execution – indicates it is unconstitutional and thus may not be used.

Just as Missouri may not switch to that approach now and still proceed in one week, it may not announce some heretofore unknown approach or unveil some heretofore concealed supplier of compounded pentobarbital. Throughout this litigation, defendants have indicated they located only one pharmacy willing to supply them with compounded pentobarbital: though they approached three pharmacies, only one said it was willing to provide the drugs. (Exhibit B at 55-59) A Missouri official obtains 10 grams of compounded pentobarbital for each execution by driving to the pharmacy and paying for the drugs with cash. (Exhibit B at 109, 128) The 10 grams procured for the Smulls execution are now expired, and the pharmacy has not supplied the 10 grams for Taylor's execution and will not do so. (Exhibit A) Any revelation of an alternate supplier of compounded pentobarbital at this point would violate not only the requirement that defendants update their discovery responses, *see* Fed. R. Civ. P. 26(e), but, more importantly, it would violate Taylor's constitutional right to due process of law. Discovery on the previous supplier was made months ago, and information came to light that the supplier had been cited for violating various laws and regulations. (Exhibit I)

To introduce a new player now, one week before a scheduled execution in litigation that has been pending for over 18 months, would not afford Taylor or this Court a meaningful opportunity to assess whether that player may constitutionally play a role in ending Taylor's life.

* * *

As two judges of the Eighth Circuit have recently reminded, "Missouri has a well-documented history of attempting to execute death row inmates before the federal courts can determine the constitutionality of the executions." (Exhibit J at 2) Missouri has no usable pentobarbital, and any attempt to procure some from an alternate supplier – or switch to midazolam and hydromorphone – would come too late to make the execution scheduled for a week from now constitutional. One defendant even said a change with twice that lead time would be "awfully quick." (Exhibit B at 147)

This Court should follow Ohio's and Louisiana's example and issue a stay to ensure that no execution occurs without due process of law.

CONCLUSION

The Court should stay Taylor's execution until he has meaningful notice of – and opportunity to challenge – Missouri's plan to take his life.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: February 18, 2014

By *s/ Matthew B. Larsen*
MATTHEW B. LARSEN
Deputy Federal Public Defender

EXHIBIT A

AP

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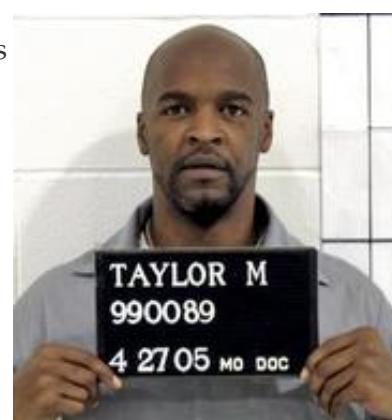
Feb 17, 10:20 PM EST

OKLA. PHARMACY WON'T GIVE DRUG FOR MO. EXECUTION

BY TIM TALLEY
ASSOCIATED PRESS

OKLAHOMA CITY (AP) -- An Oklahoma pharmacy has agreed not to provide Missouri with a made-to-order drug for an inmate's execution scheduled for later this month, according to court documents filed Monday.

According to the documents, The Apothecary Shoppe, of Tulsa, will not prepare or provide pentobarbital or any other drug for use in Michael Taylor's execution. The documents ask a judge to dismiss the case that Taylor's lawyers had filed against the pharmacy seeking to stop it from providing the execution drug. A hearing is scheduled for Tuesday.



AP Photo/Anonymous

Taylor's attorney, Matt Hellman,

Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 10 of 331

http://hosted.ap.org/dynamic/stories/U/US_EXECUTION_DRUG_LAWSUIT?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2014-02-17-21-... 1/4

said that as part of the deal, the pharmacy acknowledged it has not already provided any drug to the Missouri Department of Corrections for the execution, which is scheduled for Feb. 26.

The department and the Missouri attorney general's office did not immediately return calls Monday night seeking comment about the agreement or the status of Taylor's execution.

Missouri Gov. Jay Nixon indicated last week that the state has drugs to carry out Taylor's execution. Nixon, speaking at a news conference Thursday, did not directly answer "yes" or "no" when asked about availability of the execution drug but said, "In order to complete that ultimate responsibility, that's necessary. The Department of Corrections is prepared to carry out that execution."

Taylor pleaded guilty to abducting, raping and stabbing to death a 15-year-old Kansas City girl in 1989.

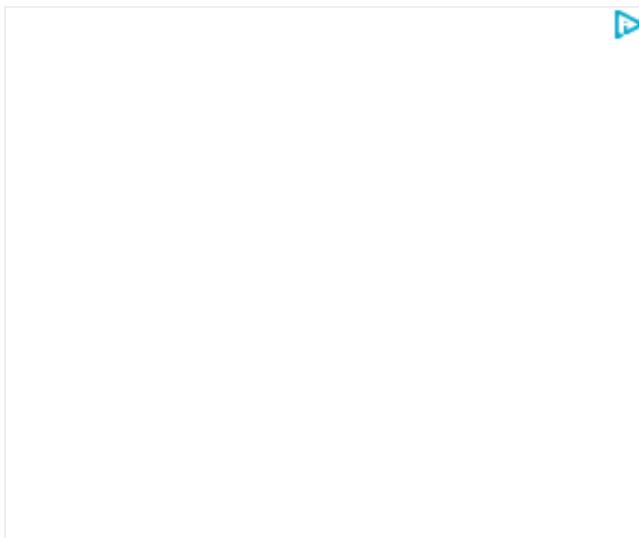
The Apothecary Shoppe has not acknowledged that it supplies a compounded version of pentobarbital to Missouri for use in lethal injections, as Taylor says, and says it can't because of a Missouri law requiring the identities of those on the state's execution team to be kept confidential.

A message left seeking comment from the pharmacy Monday night was not immediately returned.

In his lawsuit, Taylor alleged that Missouri turned to The Apothecary Shoppe to supply compounded pentobarbital because the only licensed manufacturer of the drug refuses to provide it for lethal injections. That company, Illinois-based Akorn Inc., agreed to that condition when it bought the exclusive rights to

East Wins NBA All-Star Game, Irving Na...

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INTERACTIVES



INSIDE THE TEXAS DEATH CHAMBER



SUPREME COURT ORAL ARGUMENTS: IS LETHAL INJECTION UNCONSTITUTIONAL?



ICONIC TEXAS EXECUTIONS



VIEWS ON THE DEATH PENALTY: A GLOBAL PERSPECTIVE



DEATH PENALTY BY STATE

the drug in January 2012 from a Danish company that had produced it under the trade name Nembutal.

Taylor contends that several recent executions in which compounded pentobarbital was used showed it would likely cause him "severe, unnecessary, lingering and ultimately inhumane pain."

Within 20 seconds of receiving his lethal injection on Jan. 9 at the Oklahoma State Penitentiary, 38-year-old Michael Lee Wilson said: "I feel my whole body burning." This statement describes "a sensation consistent with receipt of contaminated pentobarbital," Taylor alleges.

The lawsuit also cites the Oct. 15, 2012, execution in South Dakota of Eric Robert. Robert, 50 cleared his throat, gasped for air and then snored after receiving the lethal injection, which included compounded pentobarbital. His skin turned a purplish hue and his heart continued to beat for 10 minutes after he stopped breathing, the lawsuit contends. It took 20 minutes for authorities to finally declare Robert dead.

"These events are consistent with receipt of a contaminated or sub-potent compounded drug," the lawsuit says.

Taylor's lawsuit questions whether the Tulsa pharmacy can legally produce and deliver compounded pentobarbital. It says the pharmacy is not registered as a drug manufacturer with the U.S. Food & Drug Administration and alleges that it violates federal law each time it delivers the drug across state lines to Missouri corrections officials.

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DOCUMENTS

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MULTIMEDIA

 **DRUG WAR INTERACTIVE**

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EXHIBIT B

1 IN THE UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF MISSOURI
3
4 DAVID ZINK, et al.,)
5 Plaintiffs,)
6 vs.) No. 2:12-CV-4209-BP
7 GEORGE A. LOMBARDI, et al.,)
8 Defendants.)

10 DEPOSITION OF DAVE DORMIRE
11 Taken on behalf of the Plaintiffs
12 January 15, 2014
13 Julie K. Kearns, CCR 993

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 15 of 331
Appellate Case: 14-1193 Page: 1 Date Filed: 01/28/2014 Entry ID: 4118269

Page 2

	PAGE
1 QUESTIONS BY:	
2 Ms. Carlyle	10
3 Mr. Hansen	140
4 Ms. Carlyle	143

5

6 INDEX OF EXHIBITS

7

	PAGE
8	
9 1 - CD of discovery provided 1/9/14	5
10 2 - CD of discovery provided 12/27/13	6
11 5 - Page 8 of Exhibit 13 of Amended Complaint	65
12 6 - Page 7 or Exhibit 13 of Amended Complaint	71
13 7 - Affidavit of Dave Dormire	111
14 8 - Bates pages AG0002405 and AG000247	26
15 9 - Bates pages AG0002587 and AG0002680	26

16

17 (Whereupon the exhibits 1, 2, 5, 6 and 7 were
18 attached to the original and copies. Exhibits 8
19 and 9 retained by counsel.)

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 16 of 331

Appellate Case: 14-1193 Page: 2 Date Filed: 01/28/2014 Entry ID: 4118269

1 IN THE UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF MISSOURI
2 CENTRAL DIVISION

4 DAVID ZINK, et al.,)
5 Plaintiffs,)
6 vs.)
7 GEORGE A. LOMBARDI, et al.,)
8 Defendants.)
) No. 2:12-CV-4209-BP

10 DEPOSITION OF DAVE DORMIRE, produced, sworn, and
11 examined on the 15th day of January, 2014, between the
12 hours of one o'clock in the afternoon and seven o'clock in
13 the evening of that day, at Missouri Department of
14 Corrections, 2729 Plaza Drive, Jefferson City, Missouri,
15 before Julie K. Kearns, a Certified Court Reporter within
16 and for the State of Missouri, in a certain cause now
17 pending before the Circuit Court of the County of St.
18 Louis in the State of Missouri, wherein DAVID ZINK, et al.
19 is the Plaintiff, and GEORGE A. LOMBARDI, et al. is the
20 Defendant.

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Page 4

1 A P P E A R A N C E S

2

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 18 of 331

Appellate Case: 14-1193 Page: 4 Date Filed: 01/28/2014 Entry ID: 4118269

Page 5

1 IT IS HEREBY STIPULATED AND AGREED, by and
2 between counsel for Plaintiff and counsel for Defendant,
3 that this deposition may be taken in shorthand by Julie K.
4 Kearns, a Certified Court Reporter, and afterwards
5 transcribed into typewriting; and the signature of the
6 witness is expressly reserved.

7 * * * * *

8 (Deposition started at 1:21 P.M.)

9 (Witness sworn.)

10 MS. CARLYLE: Okay. Before we -- before I begin
11 to question Mr. Dormire, let me see if I can -- if we can
12 get the reporter to mark Exhibit 1, which is a CD
13 containing discovery provided to plaintiffs by defendants
14 on Joe -- I believe it was sent July 9 and received
15 July 10. Here it is. It's the one you sent me.

16 MR. HANSEN: Okay. I mean, I will take your
17 word that that contains what we --

18 MS. CARLYLE: Okay.

19 MR. HANSEN: You know, obviously it's going to
20 be --

21 MS. CARLYLE: If you want to look at it, it is,
22 in fact, the disk you sent me and it's read only, but I
23 can't have done anything to it. But I didn't --

24 MR. HANSEN: All I'm saying, for the record, is
25 I have not -- we haven't opened this disk up, we haven't

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 19 of 331

Appellate Case: 14-1193 Page: 5 Date Filed: 01/28/2014 Entry ID: 4118269

Page 6

1 looked at the entire disk. I have no reason to dispute
2 your representation that this is that very disk, so --

3 MS. CARLYLE: Okay.

4 MR. HANSEN: -- with that understanding, I'll
5 acknowledge that that is what's been marked as Exhibit 1.

6 MS. CARLYLE: 1.

7 (Exhibit No. 1 marked for identification.)

8 (Off the record.)

9 MR. HANSEN: Back on the record. Just to be
10 clear I think you had said that that disk was sent to you
11 on -- plaintiffs on July 9 of this year, which obviously
12 is not possible. You meant January 9; is that correct?

13 MS. CARLYLE: I did, indeed. It was sent on
14 January 9 and received on January 10.

15 MR. HANSEN: Correct.

16 MS. CARLYLE: Yeah. And Exhibit 2 is listed on
17 my list here as a disk containing the documents provided
18 on -- goodness. I have no idea why I said 12-17-2004 on
19 there. That was late last night. This was a disk of
20 discovery -- okay. Let me start over here. On
21 December 30, 2013 -- on December 27, 2013, Ms. Boresi
22 handed me a disk containing discovery documents.
23 Subsequently, based on the Court's order of December 30,
24 2013, that disk was returned to the Department of
25 Corrections. Actually, she handed me two and both of them

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 20 of 331

Appellate Case: 14-1193 Page: 6 Date Filed: 01/28/2014 Entry ID: 4118269

Page 7

1 have been returned.

2 Today I have been told that that disk will be
3 reissued with its original page numbers, but that
4 redactions have been made on documents that were not
5 present on the previous disk. The disk that -- and we are
6 hoping that that disk will be available today and if it
7 is, it will be Exhibit 2. Is that a fair statement of
8 what we have been talking about, Mr. Hansen?

9 MR. HANSEN: It is. I just want to clarify the
10 record a little bit as well. The production of documents
11 that was made by the Department of Corrections on
12 December 27 was withdrawn and it was destroyed by our
13 office and I believe the plaintiffs were directed to
14 destroy their copies as well.

15 MS. CARLYLE: Return or destroy, basically.

16 MR. HANSEN: The Department of Corrections then
17 went through those documents to ensure that all the
18 confidential information that should have been redacted
19 was, in fact, redacted and we then produced another set of
20 documents on -- which is the disk that you have identified
21 as Exhibit 1.

22 Two days ago, I believe it was two days ago,
23 Mr. Luby sent a letter expressing some concern that there
24 were fewer pages or there were pages missing on the second
25 set that were on Exhibit 1. We conducted an inquiry to

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 21 of 331

Appellate Case: 14-1193 Page: 7 Date Filed: 01/28/2014 Entry ID: 4118269

Page 8

1 see whether that was the case. As I explained by e-mail
2 to the plaintiffs earlier this morning and as I explained
3 by telephone to Miss Carlyle last night and to Mr. Luby
4 yesterday, it was determined that the reason for the
5 different number of pages was that, in going through the
6 documents a second time, they identified duplicates and
7 blank pages and removed those pages, which resulted in a
8 different number of pages being produced.

9 In order to alleviate any concerns the
10 plaintiffs may have that some documents were missing, the
11 Department of Corrections last night went through the
12 original set that was produced on December 27, redacted
13 what was necessary in that set and we then have produced
14 that set for plaintiffs here this morning.

15 You -- we won't mark it as an exhibit, but you
16 have those pages, which are identified as pages beginning
17 with AG000639 all the way through AG002514. So we
18 produced a hard copy of all those documents today and then
19 we are working on right now scanning all those documents
20 so that they will be on a disk which will be provided to
21 you hopefully before the close of the deposition today,
22 and that disk is the disk that you are going to mark as
23 Exhibit 2; is that correct?

24 MS. CARLYLE: That's correct. I guess I have
25 one question for you because I'm a little confused. I

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 22 of 331

Appellate Case: 14-1193 Page: 8 Date Filed: 01/28/2014 Entry ID: 4118269

Page 9

1 thought you said that the original discovery was withdrawn
2 and destroyed and then you said that you reviewed the
3 original discovery in order to make further redactions and
4 I'm a little confused about what it was that was destroyed
5 and what you then rereviewed a couple of days ago.

6 MR. HANSEN: I said -- to be clear, I said that
7 our office destroyed the redacted copies. So the Attorney
8 General's Office destroyed and deleted the files that we
9 had.

10 MS. BORESI: The electronic copy.

11 MR. HANSEN: The electronic copy. The
12 Department of Corrections did maintain that original --
13 that original Bates-stamped numbered production that was
14 produced and then withdrawn.

15 MS. CARLYLE: Okay.

16 MR. HANSEN: So they had the disk, they had the
17 ability then to just print that off again, go through it
18 and redact it. So it is the -- it is the same -- they are
19 the same pages, the same documents that were produced on
20 December 27 but then withdrawn.

21 MS. CARLYLE: Thank you.

22 DAVE DORMIRE,
23 of lawful age, being produced, sworn and examined on
24 behalf of the Plaintiffs, deposes and says:

25 EXAMINATION

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 23 of 331

Appellate Case: 14-1193 Page: 9 Date Filed: 01/28/2014 Entry ID: 4118269

Page 10

1 QUESTIONS BY MS. CARLYLE:

2 Q. Okay. Mr. Dormire, I think we're now finally
3 ready for you.

4 A. Sure.

5 Q. And as you know, I've taken your deposition
6 before and I think got some pretty -- some basic
7 information about you, so I won't ask about that again.
8 Let me go directly to some questions about the
9 interrogatory responses that have been filed on your
10 behalf. Let me ask you what your -- well, did you draft
11 the responses to interrogatories that you signed?

12 A. Your question is do I draft them sometimes?

13 Q. Do you draft them -- do you draft the ones you
14 sign? Did you draft the responses?

15 A. Generally. Generally, yes.

16 Q. Okay. So you draft -- it wasn't a matter of
17 someone drafting them for you and asking them to review
18 you -- review them, you drafted them yourself?

19 A. It happens both ways, but generally I draft my
20 own interrogatories.

21 Q. Okay. Now, with respect to a number of them,
22 you stated that you have no knowledge of the answer. What
23 steps, if any, did you take to find out the answers to
24 those interrogatories?

25 A. On those -- when I answered that I had no -- if

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 24 of 331

Appellate Case: 14-1193 Page: 10 Date Filed: 01/28/2014 Entry ID: 4118269

Page 11

1 I had no direct knowledge, I didn't take steps to obtain
2 additional information.

3 **Q. Have you made any attempts to supplement your**
4 **responses to -- I understand that you just recently**
5 **responded to interrogatory set number one and -- number**
6 **three and number four. First of all, have you ever**
7 **responded to interrogatories number two?**

8 A. I don't know the numbers on those
9 interrogatories. I'll remember the questions, but I don't
10 know the numbers of those.

11 **Q. Okay. Have you supplemented --**

12 MR. HANSEN: I'm going to -- I just want to make
13 a point on the record. It's my understanding that we
14 don't have interrogatory -- an interrogatory number two;
15 is that right?

16 MS. CARLYLE: I'm sorry, I'll turn this off. I
17 apologize. So your position is that you were never served
18 with plaintiff's second set of interrogatories?

19 MR. HANSEN: I'm not saying that.

20 MS. CARLYLE: Okay.

21 MR. HANSEN: What I'm saying is that we have
22 been unable to find or locate interrogatory number two.

23 MS. CARLYLE: Okay.

24 MR. HANSEN: If there exists an interrogatory
25 number two that you sent us that you would like to have

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 25 of 331

Appellate Case: 14-1193 Page: 11 Date Filed: 01/28/2014 Entry ID: 4118269

Page 12

1 answered and you contend that has not been answered, if
2 you'd provide it to us, we'll do that.

3 MS. CARLYLE: Okay.

4 Q. (By Ms. Carlyle) Have you supplemented your
5 responses to the interrogatory set number one?

6 MR. HANSEN: Objection, form of the question,
7 lack of foundation.

8 Q. (By Ms. Carlyle) Go ahead and answer if you --

9 A. I'm not -- I'm not sure that I understand.

10 Q. Okay.

11 A. If you asked me additional questions, I would
12 have answered those, to the best of my ability.

13 Q. Okay. No, that's not what I'm -- that's not
14 what I'm asking about. Once you have answered a set of
15 interrogatories, do you acknowledge that you are under an
16 obligation to supplement those answers with further
17 information if the information you provided changes?

18 MR. HANSEN: Again, I'm going to object to the
19 form of the question. It calls for a legal conclusion
20 that I'm not sure this witness is qualified to answer.

21 A. My answer to that would be I -- when I answer
22 interrogatories, I answer them to my knowledge at the
23 time. I don't know exactly what the circumstance would be
24 where I would become aware of -- I might become aware of
25 something later, but if I -- I guess potentially if I

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 26 of 331

Appellate Case: 14-1193 Page: 12 Date Filed: 01/28/2014 Entry ID: 4118269

Page 13

1 misanswered something and became knowledged, I would
2 acknowledge that.

3 Q. (By Ms. Carlyle) No, I'm actually talking about
4 answering them later because things have changed. For
5 example, if you said these are the dates -- as you did,
6 these are the dates of the trainings that we've had for
7 executions as of the time of this answer --

8 A. I see.

9 Q. -- and you're asked when are the trainings of
10 executions --

11 A. Yes.

12 Q. -- then later on, that answer would change if
13 you were to answer it that day because there would have
14 been more trainings. Are you with me?

15 A. Yes.

16 Q. Okay. So my question to you is have you ever
17 attempted to revise your answers not because you made a
18 mistake the first time, I'm not suggesting that, but to
19 take account of new information that's responsive to those
20 interrogatories that wasn't responsive at the time you
21 made your first responses?

22 A. No.

23 Q. Okay. In response to the first question in the
24 third set of interrogatories, which was, "For the
25 execution protocol and affidavit issued on October 22 of

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 27 of 331

Appellate Case: 14-1193 Page: 13 Date Filed: 01/28/2014 Entry ID: 4118269

Page 14

1 2013, identify all persons involved in the lethal
2 injection protocol team describing in detail each person's
3 roles and tasks in developing a protocol." That was the
4 question.

5 MR. HANSEN: Before you ask a specific question,
6 could I -- could you give me a minute to either find that
7 or get a copy of it? Are you talking about Defendant
8 Dormire's answers to the third set of interrogatories?

9 MS. CARLYLE: I am. I'm on page six.

10 MR. HANSEN: Okay. Thank you.

11 Q. (By Ms. Carlyle) And the term "lethal injection
12 protocol team" is actually defined in the interrogatories.
13 It's defined on page seven and -- it's defined on page
14 four, it's definition seven.

15 MR. HANSEN: Can I just ask if you're going to
16 ask him questions about his interrogatory answers that we
17 get him a -- do you have a copy for him or that he can see
18 a copy of it?

19 MS. CARLYLE: He can certainly see a copy of it.
20 I think -- yeah, let me give him this copy and I'll put it
21 up on my screen.

22 MR. HANSEN: Okay.

23 MS. CARLYLE: It will take me just a second.

24 MR. HANSEN: Will you be using it as an exhibit
25 or are you just going to ask him a question?

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 28 of 331

Appellate Case: 14-1193 Page: 14 Date Filed: 01/28/2014 Entry ID: 4118269

Page 15

1 MS. CARLYLE: I'm just going to ask him a
2 question.

3 Q. (By Ms. Carlyle) The question concerns the lethal
4 injection protocol team, and if you look at definition
5 seven on page four, that means any and all persons or
6 entities involved in the research into and assessment and
7 development of a lethal injection protocol for the
8 Missouri Department of Corrections from 2010 on.

9 In response to that -- to that interrogatory,
10 you said on page six that you are aware of Matt
11 Briesacher, Mr. Lombardi, yourself and Melissa Scheulen.
12 Are those the people who are currently involved in
13 developing lethal injection protocols or is that everybody
14 since 2010?

15 A. It's not everyone since 2010. It is the people
16 that were involved in the most recent protocol.

17 Q. So Mr. Larkins wasn't involved in that protocol?

18 A. Pardon?

19 Q. Mr. Larkins, Steve Larkins wasn't involved in
20 that protocol?

21 A. In this, no.

22 Q. What about M3?

23 A. M3, to my knowledge, was not involved in the
24 protocol.

25 Q. Who -- let's see here. You say in your

Page 16

1 **response, "The Department determined that the state of**
2 **Ohio's use of five grams of Pentobarbital represented the**
3 **best approach to resolving the request that we stop**
4 **utilizing Propofol." The Department, of course, doesn't**
5 **make any determinations as an entity, so who made that**
6 **determination?**

7 A. Mr. Briesacher did most of the research on that.

8 **Q. Who decided, though?**

9 A. I believe the department director makes the
10 final decision on it.

11 **Q. That's Mr. Lombardi?**

12 A. Yes.

13 MS. CARLYLE: Okay. Now I think we have a minor
14 logistical problem in that he needs to look at a page
15 that's on Exhibit 1, which I actually have a paper set of
16 that exhibit in my car, which I can bring in and maybe
17 that's the thing to do.

18 MR. HANSEN: I think it would be -- I think it
19 would be better and clearer to give him the actual
20 document, then mark it and attach it as an exhibit to the
21 deposition.

22 MS. CARLYLE: Okay.

23 MR. HANSEN: Rather than -- I think it would be
24 a lot easier for anybody that reads the deposition than
25 searching a disk, don't you? I mean, that's what I would

Page 17

1 suggest.

2 MS. CARLYLE: I think everybody who is going to
3 look at it is going to look at -- pretty much is going to
4 look at it electronically, but in any event, okay. So I
5 guess -- I mean, unless there's a paper copy in the
6 building, I can go get one. Do you want me to do that or
7 is there one here?

8 MR. HANSEN: Are you going to be using other
9 pages --

10 MS. CARLYLE: Oh, yeah.

11 MR. HANSEN: -- from that? I'd say let's just
12 take a break for a minute and go get the papers.

13 MS. CARLYLE: Okay. I'll go do it.

14 (Break in proceedings.)

15 Q. (By Ms. Carlyle) Okay. We're back on the record
16 and I have placed before Mr. Dormire a set of documents
17 which I am confident is a printout of the information
18 contained on Exhibit 1, which is the CD. And I'd ask you,
19 if you will, Mr. Dormire, to pull out pages 2246 through
20 49.

21 MR. HANSEN: Did you say 2246?

22 MS. CARLYLE: Yes.

23 A. Okay. I think I have those.

24 Q. (By Ms. Carlyle) Okay.

25 A. Yes.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 31 of 331

Appellate Case: 14-1193 Page: 17 Date Filed: 01/28/2014 Entry ID: 4118269

Page 18

1 Q. Let me ask you if this -- if the -- well, first
2 of all, let me ask you what this document is, I guess
3 would be the first question.

4 A. This is labeled as Missouri Department of
5 Corrections, Preparation and Administration of Chemicals
6 for Lethal Injection.

7 Q. Is it, in fact, a document that's been used now
8 as Department policy?

9 A. Say that --

10 Q. Is it, in fact, a document that's being used
11 now? Does it reflect the current Department practice and
12 policy?

13 MR. HANSEN: If you need a minute -- were you
14 asking if that's the execution protocol that's currently
15 in effect?

16 MS. CARLYLE: I guess my question is -- well, we
17 can start with that. That's a good first question.

18 Q. (By Ms. Carlyle) Is that the execution protocol
19 that's currently in effect?

20 A. No.

21 Q. Okay. Then what is it?

22 A. It is -- I don't even know if it was one of the
23 ones we proposed -- we proposed -- it looks similar, but I
24 don't know that it is one of the ones that we submitted.

25 Q. Submitted to?

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 32 of 331

Appellate Case: 14-1193 Page: 18 Date Filed: 01/28/2014 Entry ID: 4118269

Page 19

1 A. As an official protocol for our department.

2 Q. So you don't know whether this is the official
3 execution protocol or not?

4 A. I know it's not the current one we have right
5 now.

6 Q. Okay. Let me draw your attention to page 2247,
7 to the portion of the document that begins with small B
8 and ask you to just go ahead and read from there down to
9 intravenous lines.

10 A. "If the department director determines that a
11 sufficient quantity" --

12 Q. I'm sorry. You don't need to read it out loud.

13 A. Oh, I thought you were asking me to read it.

14 Q. That's fair. No, I won't put you through that.

15 A. Okay.

16 Q. Okay. Is it fair to say that that subsection B
17 deals with an execution procedure which would utilize not
18 Pentobarbital, but Midazolam and Hydromorphone?

19 A. Yes.

20 Q. Is that something that the Department is now
21 prepared to do?

22 A. No.

23 Q. Okay. Does the Department now maintain supplies
24 of Midazolam or Hydromorphone for execution purposes?

25 A. No.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 33 of 331

Appellate Case: 14-1193 Page: 19 Date Filed: 01/28/2014 Entry ID: 4118269

Page 20

1 MR. HANSEN: Hang on just a second, please.

2 MS. CARLYLE: Sure.

3 MR. SPILLANE: Go ahead.

4 Q. (By Ms. Carlyle) So can you -- what can you tell
5 me about how this -- or when was this document prepared?

6 MR. HANSEN: Objection. Well, go ahead.

7 A. I do not know the date. Sorry.

8 Q. (By Ms. Carlyle) Do you know who prepared it?

9 A. It would have been prepared primarily by
10 Mr. Briesacher and my administrative assistant.

11 Q. Okay. And actually, if you continue in your
12 pile of documents there and start looking at page
13 AGO002250.

14 MR. HANSEN: Sorry, I didn't hear the first part
15 of that.

16 Q. (By Ms. Carlyle) AGO2250 through 225 -- there
17 seems to be a lot of them -- 2267, do those appear to be
18 various versions of the same document?

19 A. Yes.

20 Q. Okay. And does seeing that refresh your memory
21 at all about when or why this was prepared?

22 A. No.

23 Q. Going back to page 2246, which lists the
24 execution team members, do those -- do the execution team
25 members listed on that document include any supplier of

Page 21

1 any chemical?

2 A. On page 46?

3 Q. 2246.

4 A. No. It mentions manufacturer, distributor or
5 compounding pharmacy.

6 Q. Right. But under subsection A it says that
7 the -- it says who the execution team members are,
8 describes them, not -- doesn't give their names, but
9 describes them, correct?

10 A. Oh, yes.

11 Q. Okay. And does it describe supplier of any sort
12 as a -- an execution team member?

13 A. No.

14 Q. Does it describe any testing laboratory as an
15 execution team member?

16 A. No.

17 Q. Does it describe any physician writing
18 prescription as an execution team member?

19 A. No.

20 Q. Now, the protocol that's in effect today
21 includes those persons as execution team members, persons
22 or entities as execution team members, doesn't it?

23 A. Yes.

24 Q. When was it decided to add those people to the
25 execution team designation?

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 35 of 331

Appellate Case: 14-1193 Page: 21 Date Filed: 01/28/2014 Entry ID: 4118269

Page 22

1 A. I don't know the exact date. It was during the
2 preparation for the last protocol.

3 **Q. Okay. Who made that decision?**

4 A. That was a decision -- obviously, Mr. Briesacher
5 was involved, myself, Director Lombardi.

6 **Q. Okay. Now, you've said that this -- that this**
7 **protocol we've been looking at that provides for an**
8 **alternative to Pentobarbital is not a protocol that's**
9 **currently in use by the Department; is that right?**

10 A. That's correct. That's correct.

11 **Q. Does -- at this point does the Department of**
12 **Corrections have any, for want of a better term, backup**
13 **plan if Pentobarbital wasn't available?**

14 A. We don't have a formal plan, no.

15 **Q. Okay. Do you have an informal plan?**

16 A. We always explore all options and watch what
17 other states are doing.

18 **Q. Has any decision been made as to what the next**
19 **plan would be?**

20 A. No.

21 **Q. Let's see here. Mr. Dormire, I'm going to hand**
22 **you what's -- hand you a copy of your answers to**
23 **plaintiff's fourth set of interrogatories.**

24 A. Okay.

25 **Q. And -- wait a minute.**

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 36 of 331

Appellate Case: 14-1193 Page: 22 Date Filed: 01/28/2014 Entry ID: 4118269

Page 23

1 MR. HANSEN: There's not a question on the
2 floor?

3 MS. CARLYLE: There is not a question on the
4 floor.

5 MR. HANSEN: I just wanted to make sure I didn't
6 miss something.

7 MS. CARLYLE: I'm actually trying to pull up
8 what Mr. Dormire is looking at. And I apologize.

9 MR. HANSEN: You want to see my copy?

10 MS. CARLYLE: I think I've got it. Here we go,
11 but thank you.

12 Q. (By Ms. Carlyle) Okay. Let me draw your
13 attention to the bottom of page five, which is -- which
14 the question was asked was there a non-public protocol for
15 the execution of Plaintiffs Joseph Franklin and Allen
16 Nicklasson and your answer was no. This morning I was
17 given two sets of documents which I thought were
18 identified as the non-public protocols for the executions
19 of Allen Nicklasson and Joseph Franklin, so obviously
20 there's some misunderstanding here. Is that what they are
21 or would you characterize this -- the documents I received
22 this morning as something else? And if you'd like to look
23 at them, I think we're over here somewhere, right?

24 MS. CARLYLE: The documents you were showing me
25 this morning.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 37 of 331

Appellate Case: 14-1193 Page: 23 Date Filed: 01/28/2014 Entry ID: 4118269

Page 24

1 MR. HANSEN: Yes.

2 THE WITNESS: You're talking security procedures
3 versus protocol.

4 MS. CARLYLE: Well, can you hand me what I
5 looked at this morning?

6 MR. HANSEN: Yeah. I'm not sure, Elizabeth. I
7 suspect that the question may have been interpreted --

8 MS. CARLYLE: Well, we'll see.

9 MR. HANSEN: -- meaning a protocol using a
10 different drug as opposed to the --

11 MS. CARLYLE: Okay.

12 MR. HANSEN: I'm not sure the same terms were
13 being used by both parties.

14 MS. CARLYLE: Well, we'll find out, won't we?

15 Q. (By Ms. Carlyle) And I guess we need to -- I
16 guess the only way to make -- for this to make any sense
17 is let's go ahead and mark those as Exhibits 8 and 9.

18 MR. HANSEN: And we do need to --

19 MS. CARLYLE: And we need to --

20 MR. HANSEN: -- acknowledge at this point that
21 this portion of the deposition should be marked as
22 confidential.

23 MS. CARLYLE: Okay.

24 (Non-confidential portion of the transcript
25 ends.)

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 38 of 331

Appellate Case: 14-1193 Page: 24 Date Filed: 01/28/2014 Entry ID: 4118269

Page 45

1 [REDACTED] [REDACTED]

2 [REDACTED].

3 A. [REDACTED].

4 Q. (By Ms. Carlyle) Well, do you have knowledge of
5 it -- have you heard something about it?

6 A. I --

7 MR. HANSEN: I'm going to object to this
8 question because it could potentially reveal the identity
9 of the pharmacy, so --

10 MS. CARLYLE: Well, I mean, I suppose if that's
11 true, anything could. I mean, I could ask him -- you
12 know, I could -- you know, knowing whether -- there are
13 presumably any number of pharmacies that have supplied
14 prisons.

15 MR. HANSEN: You can get that information from
16 other sources or from them, but you can't get it through
17 this witness.

18 MS. CARLYLE: Okay. So you're directing him not
19 to answer the question has the pharmacy provided execution
20 drugs for other prisons.

21 MR. HANSEN: He's told you he personally doesn't
22 know. Beyond that, I'm going to direct him not to answer
23 that question.

24 MS. CARLYLE: Okay.

25 MR. HANSEN: And I will note that we have

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 59 of 331

Appellate Case: 14-1193 Page: 45 Date Filed: 01/28/2014 Entry ID: 4118269

Page 46

1 offered -- for the record, we have offered to make the
2 pharmacy available for a deposition and at this point you
3 have declined. So you can get those answers directly from
4 that pharmacy as well.

5 MS. CARLYLE: Okay.

6 Q. (By Ms. Carlyle) How did -- what steps did the
7 Department -- did you or anyone else at the Department of
8 Corrections, to your knowledge, take to determine the
9 reliability or -- you know, of the pharmacy? The
10 reliability of the pharmacy, the quality of its work and
11 the likelihood that it would do what -- that it would
12 fulfill its contract.

13 A. I know Mr. Briesacher did some research. To
14 what extent, I do not know.

15 Q. Okay. It's beginning to look like we may end up
16 deposing Mr. Briesacher, but that's another day. Did you
17 or anyone else in the Department of Corrections inspect
18 the pharmacy?

19 A. I did not.

20 Q. Did you or anyone -- well, did anyone for the
21 Department of Corrections inspect the pharmacy?

22 A. I don't know of anyone else that inspected.

23 Q. Would you expect to know if someone went to see
24 the pharmacy?

25 A. I don't know that I'd know, but I don't have any

Page 47

1 personal knowledge that anyone did.

2 Q. Well, did -- did you or -- did you conduct any
3 investigation into the pharmacy's licenses and
4 registration with governmental agencies?

5 A. I did not do any investigation, no.

6 Q. Did anyone in the Department of Corrections do
7 that?

8 A. I can't speak for what Mr. Briesacher did. I
9 know he did research.

10 Q. Do you know whether the pharmacy has ever been
11 inspected by the federal Food and Drug Administration?

12 A. I don't know that myself, no.

13 Q. Do you know whether it's registered or plans to
14 register under the new drug compounding law under which it
15 could register as an outsourcing facility if it qualified
16 under the provisions of that law?

17 A. I don't know that.

18 Q. Does the pharmacy -- has the pharmacy
19 communicated to you that it adheres to the good
20 manufacturing practices promoted by the pharmacy industry?

21 MR. HANSEN: Objection, form of the question,
22 lack of foundation.

23 A. I don't -- I don't have any knowledge of that,
24 no.

25 [REDACTED]

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 61 of 331

Appellate Case: 14-1193 Page: 47 Date Filed: 01/28/2014 Entry ID: 4118269

Page 48

1 [REDACTED]

2 [REDACTED]?

3 [REDACTED]

4 Q. Can you explain the difference between
5 compounded Pentobarbital and manufactured Pentobarbital?

6 A. The difference?

7 Q. Uh-huh.

8 A. Not in real specific terms, no.

9 Q. Well, in whatever terms you can explain it in.

10 A. Well, I have a general knowledge of what
11 compounding is and that is the mixing, compounding of
12 chemicals to produce the substance.

13 Q. So is compounded Pentobarbital identical to
14 manufactured Pentobarbital?

15 A. I don't know that.

16 Q. Okay. How many pharmacists or other individuals
17 at the compounding pharmacy are involved with the
18 compounding of the Pentobarbital?

19 MR. HANSEN: Objection, form of the question,
20 lack of foundation.

21 A. I do not know.

22 Q. (By Ms. Carlyle) Do you know whether there's more
23 than one?

24 A. No, I don't.

25 Q. Where do the active pharmaceutical ingredients

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 62 of 331

Appellate Case: 14-1193 Page: 48 Date Filed: 01/28/2014 Entry ID: 4118269

Page 49

1 **in the compounded Pentobarbital come from?**

2 A. Pardon?

3 **Q. Where do the active pharmaceutical ingredients**
4 **in the Pentobarbital that's been delivered come from?**

5 A. I do not know.

6 **Q. Do you know whether they're from facilities**
7 **approved by the Food and Drug Administration?**

8 A. I do not know.

9 **Q. To your knowledge, has anyone at the Department**
10 **of Corrections made any effort to find out whether the**
11 **active pharmaceutical ingredients come from licensed and**
12 **approved facilities?**

13 A. Again, I do not know the research that was done.

14 **Q. So I'm clear, who does Mr. Briesacher report to**
15 **in the Department of Corrections?**

16 A. Mr. Briesacher is Chief Counsel. I believe he
17 reports directly to Director Lombardi.

18 **Q. Thank you. Let me ask you to pull out of your**
19 **piles over there page 1305 and I will get it, too.**

20 A. Okay.

21 MR. HANSEN: And just so we're clear in the
22 record, he is pulling out a page number from what's been
23 identified as Exhibit 1, which is a disk in discovery.

24 MS. CARLYLE: That's correct. Thank you. I
25 appreciate that.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 63 of 331

Appellate Case: 14-1193 Page: 49 Date Filed: 01/28/2014 Entry ID: 4118269

Page 50

1 Q. (By Ms. Carlyle) Page 1305 of Exhibit 1. Let me
2 ask you, first of all, to tell me what that is.

3 A. That's a memorandum to myself from Gary Stoll,
4 Fiscal and Administrative Manager.

5 Q. So Gary Stoll is the fiscal administrative
6 manager of what?

7 A. For the Department of Corrections.

8 Q. Okay. Did you request that authorization from
9 Mr. Stoll?

10 A. No. He provided this to me. I believe in -- he
11 provided this to me.

12 Q. Right. Did he provide it to you at your
13 request, though?

14 A. No.

15 Q. Okay. The memorandum refers to the volatile
16 nature of the pharmaceutical market. Can you tell me what
17 that means?

18 A. The only way I can explain it is to say that
19 it's describing it's volatile in pricing and product
20 availability.

21 Q. Do you think that a hospital would find the
22 market for Pentobarbital volatile?

23 A. I don't --

24 MR. HANSEN: Objection, form of the question,
25 lack of foundation, calls for speculation.

Page 51

1 A. I don't have a personal knowledge of that.

2 Q. **(By Ms. Carlyle) If you did not have the**
3 **authorization provided in this memorandum, how would the**
4 **procedure for obtaining bids for the procurement of**
5 **pharmaceuticals be different than it was?**

6 A. If I did not have this memo?

7 Q. Uh-huh. **What did the memo change, I guess is**
8 **what I'm asking?**

9 A. I'm implying from here that it would require
10 written bids.

11 Q. **You're implying -- you're --**

12 A. I don't have personal knowledge, but it would --

13 Q. **This memo talks about the -- that it's not**
14 **always possible to have written bids. I would assume from**
15 **this memo that normally written bids are the procedure.**
16 **So you wouldn't be involved in getting such bids normally?**

17 A. Normally I'm not, no.

18 MS. CARLYLE: Okay. Let me suggest at this
19 point that maybe we should take a break.

20 MR. HANSEN: That's fine. For the record, we've
21 been going just a little -- I guess an hour and a half.

22 MS. CARLYLE: All right.

23 MR. HANSEN: A good time for a break.

24 MS. CARLYLE: I guess partly because I had
25 asked -- partly because I need a break and partly because

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 65 of 331

Appellate Case: 14-1193 Page: 51 Date Filed: 01/28/2014 Entry ID: 4118269

Page 52

1 I had asked Mr. Dormire to fetch some documents and this
2 will give him an opportunity to do that because I was
3 about to start asking about them.

4 MR. HANSEN: Okay.

5 MS. CARLYLE: Okay.

6 (Break in proceedings.)

7 Q. (By Ms. Carlyle) Let me ask you, Mr. Dormire,
8 were you able to locate the documents to answer the
9 question about who the other two pharmacies were that
10 weren't able to supply the Pentobarbital?

11 A. Yes.

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 Q. Okay. And how did you happen to be talking to
17 those two pharmacies?

18 A. I looked up their phone number in the Yellow
19 Pages.

20 Q. Okay. What were you looking for in the Yellow
21 Pages? What category were you --

22 A. Just pharmacies.

23 Q. Pharmacies, okay. Let me ask you to pull out of
24 your set of documents there, which are the documents that
25 are paper copies of the documents on the disk which is

Page 53

1 **Exhibit 1, I'd ask you to look at page 1292, please.**

2 A. Okay.

3 Q. Okay. This document has some redactions,
4 doesn't it?

5 A. Yes.

6 Q. Can you tell us what categories of information
7 are redacted? I'm not asking you to say what it said
8 before -- after -- before it was redacted, but what sort
9 of thing was redacted? Was it names, was it numbers, what
10 was redacted?

11 A. Names and phone numbers.

12 Q. Names and phone numbers of what sort of --

13 A. Of pharmacies.

14 Q. Of pharmacies. Okay. So on this document you
15 redacted not only the pharmacy that gave you a bid, but
16 the pharmacies that didn't, correct?

17 A. Yes.

18 Q. **Why did you do that?**

19 MR. HANSEN: I'll object to the form of the
20 question and lack of -- for lack of foundation at this
21 point. Go ahead and answer that if you can.

22 A. I didn't do the redaction on this one, but
23 I'm -- I can't give you a direct answer.

24 Q. **(By Ms. Carlyle) Okay. Who did the redaction?**

25 A. Either my administrative assistant or

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 67 of 331

Appellate Case: 14-1193 Page: 53 Date Filed: 01/28/2014 Entry ID: 4118269

1 Mr. Briesacher.

2 Q. Did you review the redactions after they were
3 done to see if you agreed with them?

4 A. I did not review redactions to see if I agreed
5 with them, no.

6 Q. Did you review them at all?

7 A. I reviewed most of the paperwork that was
8 redacted, yes.

9 Q. Okay. And what was the purpose of your review
10 if it wasn't to determine --

11 A. To try to ensure that we weren't releasing
12 information that we shouldn't.

13 Q. So did you feel there was any responsibility to
14 determine that information that should be available to the
15 other side should be -- should not be redacted?

16 A. My only purpose was to look to make sure we
17 weren't identifying the individuals that by statute we
18 can't identify.

19 Q. Was there anyone whose function it was to make
20 sure that all publicly -- all information that should be
21 available to the parties -- to the opposing parties was
22 made available and not redacted?

23 A. The purpose of the redaction that I saw was to
24 protect Social Security numbers and other identifying
25 information of individuals.

Page 55

1 Q. Well, we'll get to those, too.

2 A. Okay.

3 Q. But I guess what I'm saying is was there anyone
4 who approached the redaction task with the idea we
5 shouldn't redact anything we don't have to because these
6 are documents that would ordinarily be in the public
7 domain or at least be relevant to the parties?

8 A. I don't know that I can answer that question.

9 Q. Okay. There is, however, some information
10 redacted on page 1292 which you've just given me, correct?

11 A. Yes.

12 Q. Now, the -- first of all, why don't you just say
13 for the record what is page 1292 a copy of?

14 A. It is called a State of Missouri Office of
15 Administration Bid Record Form.

16 Q. And is that a form that you filled out?

17 A. Yes.

18 Q. Is it a form you frequently fill out?

19 A. No.

20 Q. Why did you fill out -- why did you get the job
21 of filling out this one?

22 A. I believe it was to keep as confidential the
23 information that we needed to keep confidential.

24 Q. Okay. So there are -- on this bid record there
25 are three pharmacies or three, I guess, contact attempts

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 69 of 331

Appellate Case: 14-1193 Page: 55 Date Filed: 01/28/2014 Entry ID: 4118269

Page 56

1 listed, correct?

2 A. Yes.

3 Q. Two of them say that the Pentobarbital was not
4 available, correct?

5 A. Correct.

6 Q. And the third one provides a price of \$8,000?

7 A. Yes.

8 Q. Was that the only bid you got for Pentobarbital?

9 A. Yes.

10 Q. Was there -- is there any requirement that you
11 have more than one bid before making such a purchase?

12 A. We have to make contact with three potential
13 sellers.

14 Q. But you don't have to obtain more than one
15 actual quote?

16 A. No.

17 Q. Okay. Once you obtained this bid, did anyone
18 attempt to negotiate about price or anything else with
19 that pharmacy?

20 A. I did not.

21 Q. Did anyone else?

22 A. I don't know that anyone else did.

23 Q. Okay. Let me ask you to pull up page 12 -- or
24 get in front of you page 1263. While -- actually, there
25 are three pages I'd like for you to look at because I

Page 57

1 think they're the same thing and we're going to try to
2 confirm that. 1263, 1283 and 1298.

3 MR. HANSEN: 63, 83?

4 MS. CARLYLE: And 98.

5 A. Okay.

6 Q. (By Ms. Carlyle) Are those, in fact, three copies
7 of the same document?

8 A. No.

9 Q. Okay. What are the differences or have I given
10 you the wrong page number, which I am capable of doing?

11 A. Well, 1298 is a Confidential Execution Team
12 Member Receipt.

13 Q. Oh, okay. I'm sorry. Hang on.

14 A. 1263 and 1283 are dated the same date and appear
15 to be worded the same, but they're not the same documents.

16 Q. And, actually, the third one to look at is 1299.

17 A. Okay.

18 Q. So what are the differences between 1299, 1263
19 and 1298 (sic)?

20 A. 1299 has a different date on it. It appears to
21 be worded the same. All three are -- the format or the
22 wording -- the typing is different on each one, all three.

23 Q. Okay. Do you know -- I mean, what -- do you
24 have any sense about why those three documents that
25 basically seem to have the same information exist?

Page 58

1 A. At least one of these appears to be probably a
2 faxed copy of one of them.

3 **Q. Okay. Which one do you think is faxed?**

4 A. I believe 1283 is faxed.

5 **Q. Okay. But, I mean, is it -- okay. So there are**
6 **two -- and you're right, there are two dates. 1263 is**
7 **dated November 11 -- I'm sorry, 1283 is dated November 11**
8 **and 1299 is dated November 13. So the name of the**
9 **contracting party and the contractor's signature and the**
10 **printed name and the DEA number are all redacted in all of**
11 **them, correct?**

12 A. Two of them say license number, one says DEA
13 number, but yes.

14 **Q. Okay. So what -- I guess I'm -- I'm kind of**
15 **trying to figure out what I'm looking at. Are they**
16 **different agreements with different people or different**
17 **entities?**

18 A. I believe 1263 and 1283 are probably the same
19 document, but this is just a fax copy.

20 **Q. Okay. And 1299, what's it?**

21 A. 1299 is certainly a different -- different dated
22 and different handwriting than the other two.

23 **Q. So is it an agreement with a different pharmacy?**

24 A. Different medical service provider.

25 **Q. Oh, I'm sorry. 1299 is a prescriber one, isn't**

Page 59

1 it? Let's be clear. 1263 is a contract for providing

2 Pentobarbital, is it not?

3 MR. HANSEN: I'm sorry, which one did you say?

4 MS. CARLYLE: 1263.

5 A. Yes, yes.

6 Q. (By Ms. Carlyle) As -- but 1299 is actually a
7 different -- is actually, as you pointed out, a contract
8 with a -- someone to provide prescriptions, correct?

9 A. Yes.

10 Q. And let's -- let's now, and I'm sorry to have
11 led you on that wild goose chase of 1299, but take a look
12 at 1301, please.

13 A. Okay.

14 Q. Is 1301 the same as 1263 and 1283?

15 A. It looks similar to me.

16 Q. Okay. To your knowledge, how many contracts
17 with pharmacies for Pentobarbital were made?

18 A. To my knowledge?

19 Q. Uh-huh.

20 A. One.

21 Q. Okay. Because it's been the same pharmacist all
22 three times, right?

23 A. Yes.

24 Q. Yes, okay. Is that pharmacy licensed as either
25 a Missouri pharmacy or as an extraterritorial pharmacy

Page 60

1 **licensed to export drugs to Missouri?**

2 MR. HANSEN: I'm going to object to that
3 question as calling for an answer that could reveal the
4 identity of the pharmacy.

5 MS. CARLYLE: The question whether it's licensed
6 either as a Missouri pharmacy or a pharmacy licensed to
7 export drugs to Missouri could allow us to identify the
8 pharmacy?

9 MR. HANSEN: If you want to say is it licensed,
10 that would be fine.

11 MS. CARLYLE: That was the question.

12 MR. HANSEN: But to narrow it down -- well, what
13 peaked my hearing was asking if it was in Missouri.

14 MS. CARLYLE: No, I asked is it licensed as
15 either a Missouri pharmacy or an extraterritorial pharmacy
16 licensed to export drugs to Missouri.

17 A. I --

18 MR. HANSEN: Go ahead and answer.

19 A. I have seen its license. It is licensed.

20 **Q. (By Ms. Carlyle) Is it licensed either as a**
21 **Missouri pharmacy or an extraterritorial pharmacy licensed**
22 **to export drugs to Missouri?**

23 MR. HANSEN: We'll object to the form of that
24 question, lack of foundation.

25 A. I don't know that I understand exactly how

Page 61

1 you're asking the question, but it is --

2 Q. (By Ms. Carlyle) Well, let me explain. There
3 are -- I am asking you whether it falls into one of two
4 categories. One would be a Missouri pharmacy. The other
5 would be a pharmacy somewhere else that had been licensed
6 by Missouri to allow it to sell drugs in Missouri.

7 MR. HANSEN: Again, I object to the form of the
8 question and lack of foundation.

9 A. I do not know the answer to that question.

10 Q. (By Ms. Carlyle) Okay. Did anyone at the
11 Department of Corrections make inquiry about whether any
12 professional complaints had been filed against the
13 pharmacy that supplies the Pentobarbital?

14 A. Again, I do not know the research Mr. Briesacher
15 did.

16 Q. Okay. Do you think that if anyone did, it would
17 have been Mr. Briesacher?

18 A. Yes.

19 Q. Okay. Let me ask you to take a look at page
20 1260, again, of Exhibit 1, the disk with the discovery
21 supplied in January 2014.

22 A. 1260?

23 Q. 1260.

24 A. Okay.

25 Q. Can you tell us what that is, please.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 75 of 331

Appellate Case: 14-1193 Page: 61 Date Filed: 01/28/2014 Entry ID: 4118269

Page 62

1 A. That is a memo from myself to the pharmacy
2 indicating that they are to be known as pseudonym M6.

3 Q. **Okay. You say they are to be known. Is it the**
4 **entity or a particular individual who is M6?**

5 A. I addressed this to an individual.

6 Q. **So is there a separate pseudonym for the concern**
7 **that the individual works for?**

8 A. No.

9 Q. **So you addressed it to an individual. What sort**
10 **of individual is he or she? What kind of job does that**
11 **individual do?**

12 MR. HANSEN: Objection, form of the question in
13 that it lacks foundation.

14 MS. CARLYLE: I mean, what I'm looking for is
15 something like a pharmacist, the head of the company, the
16 secretary, the clerk, you know. I'm not looking for the
17 name of an individual, I'm just looking for a function of
18 the person to whom you assigned that M6 designation.

19 MR. HANSEN: I'm objecting to the form of the
20 question. It lacks foundation. I think the question
21 should be do you know and then he can say yes or no.

22 MS. CARLYLE: Okay.

23 MR. HANSEN: I'm objecting to the form of the
24 question because it lacks foundation.

25 MS. CARLYLE: Okay. Well, Mr. Hansen, do you

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 76 of 331

Appellate Case: 14-1193 Page: 62 Date Filed: 01/28/2014 Entry ID: 4118269

Page 63

1 really want me to start every question by do you know this
2 and then asking him what the answer is? It's going to
3 take a lot longer if I do that. If I ask him the question
4 and he says I don't know, that seems to me to serve the
5 same purpose, but we'll do it whichever way you want.

6 MR. HANSEN: Where I believe it's appropriate, I
7 will make the objections.

8 MS. CARLYLE: Okay.

9 MR. HANSEN: Because sometimes if I don't, it
10 leads to an answer that is -- that might be inaccurate or
11 that might be misused. So in the instance --

12 MS. CARLYLE: Let me --

13 MR. HANSEN: In the instances where I think that
14 it is necessary, I will make the objection. I've -- a lot
15 of times I haven't made the objection for the very purpose
16 so we can move it along.

17 A. He's a pharmacist.

18 Q. (By Ms. Carlyle) Okay. Let me ask you to take a
19 look at page 1261, please.

20 A. Okay.

21 Q. Now page 1261 actually contains three documents,
22 does it not?

23 A. Yes.

24 Q. Okay. Can you describe generally what they are
25 so we'll know what we're talking about?

Page 64

1 A. The first one is -- I would describe as permits,
2 retail pharmacy. The second one is a certification of
3 registration. The third one is a controlled substance
4 registration certificate.

5 **Q. Okay. And did they all pertain to the same**
6 **business?**

7 A. Pardon?

8 **Q. Do they all pertain to the same business?**

9 A. Yes.

10 **Q. Because as a result of redactions, we can't tell**
11 **what business they pertain to, correct?**

12 A. Yes; yes.

13 **Q. Okay. Will you tell us what state the pharmacy**
14 **is licensed in?**

15 MR. HANSEN: I'm going to object to that
16 question, it would be information that would lead to the
17 identity of the pharmacy, and I'll instruct him not to
18 answer that question.

19 **Q. (By Ms. Carlyle) Okay. Just so it will be on the**
20 **record, the St. Louis public radio has reported that the**
21 **pharmacy is licensed in Oklahoma. Are you willing to**
22 **confirm or deny that?**

23 MR. HANSEN: Same objection, same instruction.

24 **Q. (By Ms. Carlyle) Is the expiration date of the**
25 **license redacted in this -- this iteration of this**

Page 65

1 **document? In this document on page 1261.**

2 A. Yes.

3 **Q. Okay. Why was that redacted?**

4 A. I believe it was redacted because of attempts to
5 identify the pharmacy.

6 MS. CARLYLE: Could you mark this as Exhibit 5,
7 please?

8 (Exhibit No. 5 marked for identification.)

9 MS. CARLYLE: I'll show you what I've got
10 because I don't have another copy.

11 MR. HANSEN: Okay. I'll just clarify. I saw it
12 was identified as amended complaint, but this is an
13 exhibit that was a page from the complaint.

14 MS. CARLYLE: It was attached to the complaint,
15 yes. I think it reflects actually on its -- at the bottom
16 of it.

17 MR. HANSEN: Yes, I see that.

18 MS. CARLYLE: But let me just say that it is
19 the -- it is page eight of Exhibit 13 to the amended
20 complaint filed in this case, I believe on December 3.
21 And I believe that's actually -- the filing date is
22 actually reflected on that document.

23 MR. HANSEN: I'm not sure -- are you going to
24 ask him many questions about it or just briefly? Because
25 I'm going to want a copy of it. I don't have that handy

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 79 of 331

Appellate Case: 14-1193 Page: 65 Date Filed: 01/28/2014 Entry ID: 4118269

Page 66

1 with me.

2 MS. CARLYLE: Okay.

3 MR. HANSEN: So I'm going to either want a copy
4 of it or I can wait to get it until later if it's going to
5 be a brief question.

6 MS. CARLYLE: I'm going to ask him about the two
7 dates that are on here and not on there.

8 MR. HANSEN: I suspected, but --

9 MS. CARLYLE: Okay.

10 Q. (By Ms. Carlyle) Let me ask you whether
11 Exhibit 5, which I've just handed you, appears to be a --
12 basically the same -- contain the same three documents as
13 page 1261 that we've been looking at?

14 A. Yes.

15 Q. Okay. Does Exhibit 5 indicate the expiration
16 date of the license at the top of the page?

17 A. Yes.

18 [REDACTED]
[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] [REDACTED] [REDACTED]

24 Q. Okay. Are those two pieces of information
25 included on page 1261?

1 A. No.

2 Q. So is it your position that even though this
3 document has been publicly filed in court and served on
4 your counsel, you are still entitled to redact it from
5 discovery you provide in this case?

6 MR. HANSEN: Objection to the form of the
7 question, calls for a legal conclusion.

8 A. We are aware that people have attempted to
9 identify the pharmacist by using those dates, so yes.

10 [REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

14 Q. Let me just ask you to take a look at page 1287
15 and ask you whether that contains the same three documents
16 as 1261?

17 A. Yes, it appears to be the same.

18 Q. Okay. If you'll look at page 1265, please. And
19 can you tell me what those are, if you know?

20 A. Not from the redacted copy, I can't.

21 Q. Okay.

22 A. They say doctor or pharmacy and its expire date
23 and labeled as receptor.

24 Q. Or preceptor?

25 A. Preceptor, I'm sorry. I missed the P.

Page 68

1 Q. Do you know whether those two cards, if we can
2 call them that, that are copied there, pertain to the same
3 person?

4 A. No, I don't.

5 Q. Could you look at the unredacted documents and
6 tell me what they are and whether they pertain to the same
7 person?

8 A. I could.

9 Q. Okay. You want to do that now or shall we --

10 MS. CARLYLE: What do you want to do?

11 MR. HANSEN: Do you -- off the record.

12 MS. CARLYLE: Sure.

13 (Off the record.)

14 MS. CARLYLE: Back on the record.

15 Q. (By Ms. Carlyle) So what --

16 A. These cards are from two different pharmacists.

17 Q. Are they pharmacists who work for the pharmacy
18 who --

19 A. Yes.

20 Q. -- which compounds the Pentobarbital?

21 A. Yes.

22 Q. Are you willing to tell me -- I mean, are they
23 issued by some government or an educational institution or
24 what, the cards?

25 MR. HANSEN: I'm going to object to the form of

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 82 of 331

Appellate Case: 14-1193 Page: 68 Date Filed: 01/28/2014 Entry ID: 4118269

Page 69

1 the question in that it lacks foundation.

2 A. I just glanced at them real quickly, but they
3 are by government.

4 Q. (By Ms. Carlyle) Okay. And you've redacted the
5 date that they expire? You're not willing to tell us
6 that?

7 A. Right.

8 Q. Okay. So we can't tell by looking at what we
9 have whether they're current or not?

10 A. No.

11 Q. Are they current?

12 A. Yes.

13 Q. Could you take a look at page 1289 and tell me
14 if those are the same two documents?

15 A. Okay.

16 Q. Now, according -- I'll just tell you that
17 according to my notes in the December 27 version of this
18 discovery, the expiration date was not redacted, although
19 since I don't have that discovery, I don't know what it
20 was. Was there -- were you -- did you participate in a
21 decision to redact that information, although it had not
22 been previously redacted?

23 A. I didn't do the redaction, but I knew that we
24 are -- our intent was to try to redact those type -- that
25 sort of information, yes.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 83 of 331

Appellate Case: 14-1193 Page: 69 Date Filed: 01/28/2014 Entry ID: 4118269

Page 71

1 (Exhibit No. 6 marked for identification.)

2 MR. HANSEN: If I could see it before you hand
3 it to him, too, please.

4 MS. CARLYLE: Sure. I will do that.

5 Q. (By Ms. Carlyle) Before I do that, so do you have
6 any idea why the words on the line that begins "to follow
7 up on our phone conversation" were redacted?

8 A. No.

9 Q. Okay. Are you aware that in previous versions
10 of this document provided as a Sunshine Law request, those
11 words were unredacted?

12 A. No.

13 Q. Mr. Dormire, I'm handing you a document which is
14 the page seven of the Exhibit 13 to the amended complaint
15 filed in this matter on December 3 of 2013. And I'll ask
16 you whether that appears to be a copy of the same e-mail
17 that you're looking at on page 1307?

18 A. Yes, it appears to be the same.

19 MR. HANSEN: I just want to look at one thing.

20 THE WITNESS: Sure.

21 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Page 72

1 Q. Do you contend that the manufacturer of the raw
2 materials from which the compounded Pentobarbital is made
3 is a member of the execution team?

4 A. The manufacturer?

5 Q. Uh-huh.

6 A. No.

7 Q. Let me draw your attention to, let's see here,
8 page 1310 and 1312 and ask if you know what those
9 documents are?

10 A. 1310 is labels for Pentobarbital and 1312 is
11 also a label.

12 Q. And are they -- is 1312 one of the same labels
13 in 1310 or can we tell?

14 A. They are similar, yes.

15 Q. Okay. So what information is redacted? I mean,
16 again, I'm not asking you to tell me what it says, but
17 what category of information has been redacted there?

18 A. Name of the pharmacy, and its address, I assume,
19 phone numbers, probably. I don't know --

20 Q. Okay.

21 A. -- what all was redacted there.

22 Q. Okay. Do those labels bear a date?

23 A. Yes. November 13, 2013.

24 Q. And when was Joseph Franklin executed?

25 A. I want to say the 20th, but I don't know that

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 86 of 331

Appellate Case: 14-1193 Page: 72 Date Filed: 01/28/2014 Entry ID: 4118269

1 I'm -- I don't know if I have a document in front of me
2 that shows what exact date.

The figure consists of a 10x10 grid of black bars. The bars are primarily horizontal, spanning most of the width of the grid. There are several vertical bars and shorter horizontal bars that break this pattern. The grid is enclosed within a thick black border.

15 Q. And while we're at it, let's take a look at
16 2048, 2049 and 2056.

17 MR. HANSEN: Can you say those one more time?

18 MS. CARLYLE: 2048, 49 and 56.

19 MR. HANSEN: Thank you.

20 A. 48 -- if you will, one more time.

21 Q. (By Ms.

22 A. Okay.

23 Q. Tell me

24 A. 2048 appears to be a letter ad

25 Mr. Briesacher.

Page 74

1 Q. And can you tell what sort of person or business
2 the letter is from?

3 A. It's making reference to laboratory
4 accreditation, so I believe this is the testing
5 laboratory.

6 Q. Okay. And 2049 is an invoice, is it not?

7 A. It appears like one.

8 Q. Okay. Let me look at one more thing here.

9 Okay. Let's talk about execution training here. When we
10 took your deposition last time and you acknowledged that
11 there had been some execution training that had been
12 occur -- that had occurred since you gave your
13 interrogatory answers in February of 2013, have you
14 provided your counsel or us with a list of training since
15 then?

16 MR. HANSEN: Since which day?

17 MS. CARLYLE: Since February of 2013.

18 A. Mr. Briesacher is aware of training dates, but I
19 don't know that that's been provided to you.

20 Q. (By Ms. Carlyle) Okay. Are you able to provide a
21 list now?

22 A. Not off the top of my head.

23 MR. HANSEN: We'll get you a list of new
24 training.

25 MS. CARLYLE: Okay. What I need to know about

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 88 of 331

Appellate Case: 14-1193 Page: 74 Date Filed: 01/28/2014 Entry ID: 4118269

Page 75

1 the training is when it was and who was present for each
2 training, where it was. I mean, I guess -- let me put it
3 this way. If you look at the -- if you look at the -- at
4 the first set of interrogatories, which is what we're
5 talking about supplementing, you'll see what information
6 we requested about each of the trainings and that's the
7 information we still want. So if I have not successfully
8 remembered it because I'm not looking at them, my question
9 would be as to each of those trainings, please supply the
10 information requested in the first set of interrogatories
11 which were answered last February.

12 MR. HANSEN: All right.

13 Q. (By Ms. Carlyle) Have you been present for any
14 of -- any trainings that have occurred since the
15 Pentobarbital protocol went into effect?

16 A. Yes.

17 Q. Okay. How many?

18 A. One that I remember for sure. I think just one.

19 Q. And do you have some idea when that was?

20 A. I -- I don't know the date. It was a month to
21 month and a half prior to the execution, I believe.

22 Q. So what -- can you kind of walk me through what
23 happened at that -- at that training in terms of what
24 category of people were there and what they all did and --

25 A. The people that are normally there and

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 89 of 331

Appellate Case: 14-1193 Page: 75 Date Filed: 01/28/2014 Entry ID: 4118269

Page 76

1 responsible for their jobs are there during that practice.

2 Q. But -- so I mean you -- you can use pseudonyms
3 if you want to, but I need you to tell me who those people
4 are.

5 A. Okay. Well, certainly the warden is there and
6 the deputy warden and the medical personnel are there, the
7 non-medical personnel are there.

8 Q. So at this point we have, in terms of medical
9 personnel who are there, we have M3; is that correct?

10 A. Yes.

11 Q. We have M2?

12 A. Yes.

13 Q. And then there's non-medical 1 and 2?

14 A. Yes.

15 Q. By the way, before I forget to ask you this, who
16 is or was M4?

17 MR. HANSEN: Again, you're not asking the
18 identity, you're asking --

19 MS. CARLYLE: No, I'm asking what sort of person
20 was M4.

21 A. That dates past me. I do not know.

22 Q. (By Ms. Carlyle) Okay. Okay. And so back to
23 training for a moment. Okay. The -- so the medical and
24 non-medical personnel are there and so do they, then, sort
25 of simulate what happens during an execution?

Page 77

1 A. Yes.

2 Q. So what do they do to simulate it? I mean, sort
3 of tell me what happens.

4 A. Just about every process that we do on a normal
5 execution, they simulate what will occur and what they
6 would do.

7 Q. Well, I need you to tell me what that is.

8 A. The medical staff prepares syringes, the
9 non-medical staff practice what they would do in a
10 procedure with those syringes.

11 Q. Do they -- I mean, does someone get strapped
12 down to a gurney?

13 A. No.

14 Q. Okay.

15 A. We don't do that.

16 Q. Okay. I mean, I know you don't administer the
17 drugs to them, but okay. So when you say the medical --
18 the non-medical -- so the medical personnel don't practice
19 starting intravenous lines and so forth, do they?

20 A. No, they don't.

21 Q. Okay. And the non-medical people don't practice
22 administering the drugs because there's no one or nothing
23 to administer them to. So what --

24 A. They do practice with the syringes, though, yes.

25 Q. So what do they do with the syringes?

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 91 of 331

Appellate Case: 14-1193 Page: 77 Date Filed: 01/28/2014 Entry ID: 4118269

Page 78

1 A. It is discarded.

2 Q. No, I mean, what do they do with the syringes
3 during the training?

4 A. They --

5 Q. What physically do they do?

6 A. They push the syringes.

7 Q. Into what?

8 A. Into a bag that is discarded.

9 Q. So into a bag that would normally be connected
10 to a line that went into a person?

11 A. Yes.

12 Q. Okay. And who supervises the training?

13 A. It is -- the medical staff are overseeing,
14 watching what the non-medical staff do.

15 Q. Okay. The medical staff being M2 and M3?

16 A. Pardon?

17 Q. The medical staff being M2 and M3 or are there
18 other medical staff?

19 A. Yes, yes. The warden is watching parts of the
20 aspect, I myself am watching parts of the aspect.

21 Q. So what are you watching?

22 A. Just that we're following the protocol and doing
23 the things we're supposed to do.

24 Q. Let me ask you to take a look at the -- at a
25 chronological log that -- there's one that begins at page

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 92 of 331

Appellate Case: 14-1193 Page: 78 Date Filed: 01/28/2014 Entry ID: 4118269

Page 79

1 676 and one that begins at page 689 and they're kind of
2 multi-page documents.

3 A. Stuck together. 676 to --

4 Q. 686. I'm sorry, wait a minute. If I said 676,
5 that's what I meant.

6 MR. HANSEN: Yeah, 676.

7 MS. CARLYLE: 676, yeah.

8 A. To -- all the way to 686?

9 Q. (By Ms. Carlyle) Well, I think there may be some
10 things in between. Hang on just a second. But there's
11 sort of a log that begins as 676, correct?

12 A. Yes.

13 Q. Okay. And then there's another log that begins
14 at 689. My question for you is can you explain to me what
15 those two logs -- how they -- you know, what they are,
16 whether they're -- who does them and why they do them and
17 so forth?

18 A. These are -- these are logs by the officers --
19 the first one is by -- for sure by the officer at the
20 holding cell.

21 Q. Okay.

22 A. The second one appears to be the same sort of
23 thing, but not on that form. There are -- without looking
24 at exact times and things, I don't know whether --

25 Q. Well, I think there's actually some overlap, but

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 93 of 331

Appellate Case: 14-1193 Page: 79 Date Filed: 01/28/2014 Entry ID: 4118269

Page 80

1 I'm just wondering why -- how it happens that we have one
2 set on a form and one set that's not and whether there are
3 different people who -- anyway, why that is, I guess.

4 A. There are -- I know there are two officers
5 assigned to that post.

6 Q. Okay.

7 A. My opinion would be that both are filling out a
8 log themselves.

9 Q. I see. So one of them is using the form and one
10 of them isn't?

11 A. Yes.

12 Q. Okay. Is there anything wrong with that as far
13 as your -- from a procedural standpoint?

14 A. We ask them to fill out a log. I don't -- we
15 have various forms that we call the term chronological
16 logs, so to see different logs doesn't surprise me.

17 Q. Okay. But what you're telling me -- if I
18 understand you correctly, maybe you can -- the two -- the
19 log that begins on 676 and the log that begins on 689,
20 it's not like they're file -- they're prepared by
21 different officers with different -- with assignments to
22 record different types of things?

23 MR. HANSEN: I'm going to object to the form of
24 that question. It's compound and so confusing. You said
25 it's not filled out by two different officers. I think I

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 94 of 331

Appellate Case: 14-1193 Page: 80 Date Filed: 01/28/2014 Entry ID: 4118269

Page 81

1 understand what you meant, but --

2 **Q. (By Ms. Carlyle) It is filled out by two**
3 **different officers. I guess what I'm asking you, is it**
4 **two different officers with two different assignments to**
5 **record two different sets of information?**

6 A. Just to start off, there are different -- quite
7 a few different dates. One is November 19, one is
8 November 15, so four days apart.

9 **Q. Right. I guess --**

10 A. This one for sure --

11 **Q. I'm sorry, when you say this one, tell us which**
12 **one it is.**

13 MR. HANSEN: Use the page number.

14 **Q. (By Ms. Carlyle) Use the page number, please.**

15 A. The 19th.

16 MR. HANSEN: Down at the bottom.

17 **Q. (By Ms. Carlyle) Down at the bottom, what page?**

18 A. Oh, 676.

19 **Q. Thank you.**

20 A. That's dated November 19. That is -- the post
21 is CP offender holding cell.

22 **Q. Okay.**

23 A. The second one doesn't identify the post, but
24 identifies the date as November 15, third shift.

25 **Q. Okay. And -- but do you think that the person**

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 95 of 331

Appellate Case: 14-1193 Page: 81 Date Filed: 01/28/2014 Entry ID: 4118269

Page 82

1 who completed 689 -- the log beginning on 689 was also an
2 officer in the holding cell or was he somewhere else?

3 A. It appears he was at the holding cell as well,
4 yes.

5 Q. Okay.

6 A. He's making notations about Offender Franklin.

7 Q. Okay. And that's something that -- I mean, is
8 that something that's specific to the duties of someone in
9 the holding cell as opposed to -- as opposed to someone
10 who's just an officer when Mr. Franklin is not yet in the
11 holding cell?

12 A. I believe our orders require a -- one officer to
13 track when an offender is in a holding cell status, so we
14 are required to do a chronological just specifically on
15 that offender.

16 Q. Okay. But if -- I mean, so these are both
17 holding cell logs, I guess is what we're saying?

18 A. They appear to be that, yes. I see references
19 to the holding cell in this other log, yes.

20 Q. Okay. Now, on page 689, it appears that there's
21 been something redacted?

22 A. Yes. Appears to be a phone number.

23 Q. Okay. What -- why did you redact the phone
24 number?

25 A. I was aware they went through and redacted

Page 83

1 almost all the phone numbers of individuals.

2 Q. Why?

3 A. Just to protect their identity, I guess.

4 Q. Do you -- were -- I mean, you say they went
5 through and redacted. What --

6 A. Well, I am aware my administrative assistant
7 went through and redacted phone numbers. Any time there
8 were phone numbers, she redacted them.

9 Q. Okay. Was she -- did you tell her to do that?

10 A. No. I knew she was doing that, though.

11 Q. Okay. Do you know if anyone told her to do
12 that?

13 A. I believe she consulted with Mr. Briesacher to
14 do that.

15 Q. Okay. Let's go back -- let's look at page 662.
16 We have some redactions and they look like phone numbers
17 as well; is that correct?

18 A. Yes.

19 Q. There is a reference on page 62 next to the time
20 entry 4:54 that says code 21?

21 A. Yes.

22 Q. What's code 21?

23 A. That's a good count.

24 Q. What about 4:30, about code 20?

25 A. Code 20 is the announcement, radio announcement.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 97 of 331

Appellate Case: 14-1193 Page: 83 Date Filed: 01/28/2014 Entry ID: 4118269

Page 84

1 Code 20 is to count.

2 Q. Is to count and code 21 is that the count is
3 cleared?

4 A. Yes.

5 Q. Code 21. Okay. I have a list of redactions
6 that I wanted to check on. Just so we're --

7 MR. HANSEN: I'm just going to -- while we're
8 talking about it, my understanding is they redact because
9 their policy is to always redact phone numbers. Most of
10 the things that are redacted are phone numbers. If you
11 want the phone numbers for any specific one, we can get
12 you the phone numbers.

13 MS. CARLYLE: They didn't redact them the first
14 time.

15 MR. HANSEN: So --

16 MS. CARLYLE: I guess, you know, just for the
17 record, our objection is you can't just redact your
18 documents because you feel like protecting somebody.
19 They're documents. We ask that they be produced.

20 MR. HANSEN: I'm telling you what they did.

21 MS. CARLYLE: I understand what they did.

22 MR. HANSEN: And I'm telling you if -- we -- if
23 you want all the phone numbers, we'll talk to them. We
24 can probably get you all the phone numbers.

25 MS. CARLYLE: I'd say everything that's redacted

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 98 of 331

Appellate Case: 14-1193 Page: 84 Date Filed: 01/28/2014 Entry ID: 4118269

Page 85

1 in these documents that doesn't pertain to the identity of
2 the execution team we would like unredacted.

3 MR. HANSEN: Okay.

4 Q. (By Ms. Carlyle) I guess I'm just -- I'm taking a
5 second to kind of go over these to determine if there are
6 any I really need to ask him for rather than ask him on
7 every page and did you redact phone numbers. So if you
8 give me just a second, I think I can -- it may look like
9 we're not doing anything, but we'll actually speed things
10 up a little.

11 MR. HANSEN: And I -- while we're on the record,
12 since I just -- we just had this conversation about phone
13 numbers and providing those, I think I said that we would
14 provide those that aren't on the execution team or that
15 would reveal the execution team and my co-counsel has
16 pointed out that there may be some phone numbers that we
17 think are still protected as that they're protected as a
18 state secret, principally --

19 MR. SPILLANE: The laboratory.

20 MR. HANSEN: -- the testing lab.

21 MR. SPILLANE: The laboratory is not a member of
22 the execution team, but they've been declared a state
23 secret.

24 MS. CARLYLE: Okay.

25 MR. HANSEN: I wanted to make that clear.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 99 of 331

Appellate Case: 14-1193 Page: 85 Date Filed: 01/28/2014 Entry ID: 4118269

Page 86

1 MS. CARLYLE: Okay. And similarly, I mean, just
2 for example, on page 718, I think there's an address of
3 a -- of an offender witness that's redacted. I mean, you
4 know, as I say, if it's not -- if there's not -- it
5 doesn't have to do with your state secret or execution
6 team privilege, we'd ask that all the redactions be
7 removed.

8 MS. BORESI: And off the record.

9 (Off the record.)

10 Q. (By Ms. Carlyle) Let me -- let me show you again
11 your responses to the third set of interrogatories, and
12 I'm handing them to you open to page seven so you can see
13 them -- your response to interrogatory five. You were
14 asked to specify the tasks each member of the medical
15 personnel will do and what you did there was to say
16 medical personnel will do this and medical personnel will
17 do that. What we're trying to get at is what each member
18 does. So if you can tell us now, of the tasks that you
19 set out there, who does what, please do that.

20 A. Okay.

21 MR. HANSEN: Hang on just a second. Did you --
22 again, you didn't identify this as an exhibit, right?

23 MS. CARLYLE: No. These are his responses to
24 interrogatories.

25 MR. HANSEN: Right. I just want to make sure

Page 87

1 I've got this clear for the record.

2 MS. CARLYLE: Okay.

3 MR. HANSEN: Go ahead.

4 A. M5 would prescribe. M6 would supply, compound
5 and supply the Pentobarbital. M2 and M3 together would
6 prepare and label the syringes. And M2 and M3 would
7 together determine most appropriate location for
8 introduction of intravenous lines.

9 **Q. (By Ms. Carlyle) That's part of M2's job as well?**

10 A. M2 and M3 together.

11 **Q. Okay. So who monitors? Which of the two**
12 **monitors the prisoner during the execution?**

13 A. Oh, next page.

14 **Q. Okay.**

15 A. Both M3 and M2. Both M2 and M3 evaluate the
16 prisoner to confirm death. Both M3 and M2 are involved in
17 disposal of unused chemicals. One of the medical
18 personnel, either M2 or M3, signs the sequence of chemical
19 form. And either M2 or M3 would complete and sign the
20 chemical log indicating the quantities of chemicals used
21 and the quantities discarded.

22 **Q. Okay. Let's take a look at page 722.**

23 A. There's that.

24 **Q. Thank you.**

25 MR. HANSEN: Again, for the record, we're going

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 101 of 331

Appellate Case: 14-1193 Page: 87 Date Filed: 01/28/2014 Entry ID: 4118269

Page 88

1 back to Exhibit 1.

2 MS. CARLYLE: We're going back to Exhibit 1.

3 And I appreciate your saying that. I keep forgetting to.

4 MR. HANSEN: That's all right. 7 --

5 MS. CARLYLE: We're going to take a look at page
6 722.

7 A. Yes.

8 Q. (By Ms. Carlyle) And 723. While you're there,
9 you might as well grab them both. Okay. Page 722 is --
10 what is it?

11 A. 722 is the chemical log.

12 Q. Okay. And it has signatures, if you can call
13 them that, of M3 and M2, correct?

14 A. That's correct.

15 Q. Okay. Signing as M3 and M2. And then there are
16 two signatures showing that it's been approved. Can you
17 tell me whose signatures those are?

18 A. One is myself and one is Director Lombardi.

19 Q. Okay.

20 MR. HANSEN: Can we stop just for about 30
21 seconds?

22 MS. CARLYLE: Sure.

23 (Off the record.)

24 MS. CARLYLE: Okay. Back on the record.

25 Q. (By Ms. Carlyle) Does page 722 reflect that

1 **Versed was used?**

2 A. Yes.

3 Q. **And what was that used for?**

4 A. I believe that was used as a sedative.

5 Q. **Is -- is Versed a part of the written execution**
6 **protocol?**

7 A. Not -- not named, no.

8 Q. **What's the purpose of a sedative during the**
9 **execution?**

10 A. We are -- our protocol directs us to offer a
11 sedative and then also allows the doctor to issue one if
12 he believes it's needed based on -- I don't know if it's
13 the doctor by themselves or the doctor with the director's
14 approval.

15 Q. **Well, what would be the criteria for deciding to**
16 **administer the sedative?**

17 A. First criteria is that the offender requests
18 one.

19 Q. **Right. But after that, assuming the offender**
20 **doesn't request one?**

21 A. I don't have it in front of me, but there is a
22 notation about -- in protocol about a sedative can be
23 given.

24 Q. **I understand that there's a notation that a**
25 **sedative can be given. I'm just asking why would a**

Page 90

1 **sedative be given, other than at the request of the**
2 **offender?**

3 A. I can think of scenarios where an offender would
4 be out of control and that would be needed, but I don't
5 know that.

6 **Q. Okay. So who administers the sedative?**

7 A. M2, M3.

8 **Q. Okay. And is that administered -- how is it**
9 **administered? Is it oral or injected or --**

10 A. I don't know.

11 **Q. Okay. In relation to the execution itself, at**
12 **what time is it administered?**

13 A. There's a specific time ahead of the execution
14 it's to be offered if the execution is on schedule. Then
15 it's -- then I know there's -- I mean, less time if they
16 were not on schedule. So it was sometime before.

17 **Q. Okay. Now, page 722 also reflects that -- if**
18 **I'm reading it correctly, that five grams of Pentobarbital**
19 **were used and five grams were returned. Is that a fair**
20 **reading of page 722?**

21 A. Yes.

22 **Q. Where were they returned to?**

23 A. They were not -- not -- they were returned to
24 the counter, I believe, but not -- certainly not returned
25 to a pharmacy.

Page 91

1 Q. Okay. So do you have any idea why the notation
2 returned in the column called amount discarded was made?

3 A. No.

4 Q. In fact, was the unused -- what happened to the
5 unused Pentobarbital?

6 A. They were destroyed.

7 Q. Okay. So it's not saved for the next execution?

8 A. No.

9 Q. Okay. Let's take a look if we can at page 15 --
10 well, 1142, actually.

11 A. Okay.

12 Q. So I guess, first of all, my question is are
13 1142 and 723 the same thing?

14 A. They appear to be.

15 Q. Okay.

16 A. Yes.

17 Q. Okay. And 1524 and 1541.

18 MR. HANSEN: Off the record.

19 (Off the record.)

20 A. Okay.

21 Q. (By Ms. Carlyle) Both of those two documents
22 mention a -- a person named Wampler on 1524, he is
23 identified as CO1 Wampler and on 1541 he's identified as
24 Travis Wampler. Are you aware of whether that person is
25 related to the family who was the victim of now executed

Page 92

1 **prisoner Richard Oxford?**

2 A. I have no idea.

3 **Q. Okay.**

4 MR. HANSEN: What was the name, first name of
5 Oxford that you mentioned?

6 MS. CARLYLE: Richard.

7 MR. HANSEN: Richard Oxford?

8 MS. CARLYLE: Yeah.

9 **Q. (By Ms. Carlyle) Can you take a look, please, at**
10 **1334 and 1335?**

11 A. Okay.

12 **Q. Can you tell me what the difference is between**
13 **those two documents?**

14 A. There's additional names. This one appears to
15 be simply a state witness list and one appears to be both
16 a state witness list, an offender witness list and a
17 victim's witness list.

18 **Q. Okay.**

19 MR. HANSEN: I think I may have the wrong
20 numbers. Which ones did you say?

21 MS. CARLYLE: We're looking at 1334 -- what did
22 I say? 1334 and 1335.

23 MR. HANSEN: I wrote down the right numbers, but
24 I'm looking at the wrong numbers. If you'd hang on just a
25 second until I get to that page, I'd appreciate it.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 106 of 331

Appellate Case: 14-1193 Page: 92 Date Filed: 01/28/2014 Entry ID: 4118269

Page 93

1 MS. CARLYLE: Okay.

2 A. The names appear -- as far as state witness,
3 they appear to be the same, as far as the names.

4 Q. (By Ms. Carlyle) I see. And let's take a look at
5 2043. Okay. What -- that's a photograph. What's it a
6 photograph of?

7 A. It's a photograph of four syringes.

8 Q. Okay. Can you tell me the nature of the
9 information that's redacted on those syringes?

10 A. It would be the name of the pharmacy.

11 Q. Okay. Can you tell me what -- can you just tell
12 me what 2015 is, what it's for?

13 MR. HANSEN: Which page?

14 MS. CARLYLE: 2015.

15 MR. HANSEN: It would have been a lot easier if
16 you went to chronological order.

17 MS. CARLYLE: I know.

18 A. It is a count report.

19 Q. (By Ms. Carlyle) 2015?

20 A. What?

21 Q. 2015.

22 A. I'm sorry.

23 Q. That's okay. I was going to say wait a minute.

24 A. 20 -- I'm sorry.

25 Q. That's okay. There are a lot of notes.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 107 of 331

Appellate Case: 14-1193 Page: 93 Date Filed: 01/28/2014 Entry ID: 4118269

Page 94

1 A. I've got to go back the other way. That's it.

2 Q. **I don't think so.**

3 A. 2015.

4 MR. HANSEN: 2015, yeah, that's what I have.

5 MS. CARLYLE: Huh.

6 A. That is a -- hang on a second, because that's
7 not what I have either.

8 Q. **(By Ms. Carlyle) Yeah. Well, it is, but it**
9 **doesn't have -- it was just cut off. I think what**
10 **happened was the top was cut off because at the top of**
11 **mine, which you're welcome to see, it says State Witness**
12 **Briefing, DAI Director.**

13 A. Yes, yes. That is the statement I read to
14 the --

15 MR. HANSEN: For the record, the only thing
16 missing is the bolded title that's centered at the top of
17 the page.

18 MS. CARLYLE: Okay. Okay.

19 A. But that is the debriefing statement that I read
20 to them.

21 Q. **(By Ms. Carlyle) The debriefing statement?**

22 A. It's a -- sorry, a brief -- a briefing that I
23 read to the state's witnesses.

24 Q. **Okay. And when do you do that?**

25 A. Prior to the execution. Prior to moving them to

Page 95

1 the area where they'll watch the execution.

2 Q. I can't figure out why the sun is in my eyes
3 here, but is there anything --

4 MR. HANSEN: Because it's setting.

5 MS. CARLYLE: Yeah, right. Yeah, there we go,
6 perfect.

7 MS. BORESI: It was reflecting.

8 MS. CARLYLE: Okay.

9 (Off the record.)

10 MS. CARLYLE: Okay. Back on the record.

11 Q. (By Ms. Carlyle) So that -- does that mean that
12 for each execution, you're actually at the prison?

13 A. Yes.

14 Q. Do you witness the execution?

15 A. Yes.

16 Q. Okay. And so you were -- this is -- this is a
17 statement that you read to all of the --

18 A. State's witnesses.

19 Q. Okay. And who -- not by name, but what -- can
20 you tell me what the category of state's witness includes?
21 Who are those people?

22 A. It is -- the last two times it has included some
23 media, but it is people that apply to be a state -- a
24 witness for the state.

25 Q. Okay. Are they a different group of people than

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 109 of 331
Appellate Case: 14-1193 Page: 95 Date Filed: 01/28/2014 Entry ID: 4118269

Page 96

1 the people who are, say, families of the victim?

2 A. Yes.

3 Q. So those aren't state witnesses under this
4 category?

5 A. Correct.

6 Q. And people who are friends or relatives of the
7 person who's been executed, are they state witnesses?

8 A. No. They are separate.

9 Q. Okay. Well, speaking -- actually, that's an
10 interesting segue into what we're going to talk about
11 next, which is the witnesses to the Joseph Franklin
12 execution. Are you aware that the -- that Mr. Franklin's
13 witnesses left the institution before the execution
14 occurred?

15 A. Yes.

16 Q. Okay. You stated in the response to your -- to
17 the fourth interrogatories that you didn't know whether
18 anyone had tried to notify them or counsel at the specific
19 time when the execution was starting; is that correct?

20 A. I don't remember that question on
21 interrogatories --

22 Q. Okay. Let's take a look at that.

23 A. But I do not know that. That's true.

24 Q. I'm not sure what happened to the fourth ones.

25 A. This one?

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 110 of 331

Appellate Case: 14-1193 Page: 96 Date Filed: 01/28/2014 Entry ID: 4118269

Page 97

1 **Q.** **Yep. It's the answer to interrogatories six and**
2 **seven.**

3 **A.** Yeah, I do not know. Right.

4 **Q.** **So who would know that?**

5 **A.** Whether an attempt was made?

6 **Q.** **Yes.**

7 **A.** Someone at the institution would know that.

8 **Q.** **You were at the institution?**

9 **A.** I was, I was.

10 **Q.** **Okay.**

11 **A.** I was not in the administration building. I was
12 down at the -- in the support room. So I --

13 MR. HANSEN: Describe to her whoever that person
14 would be, the job title or if you know the name.

15 THE WITNESS: It would be -- there would be one
16 or two people. It could be the deputy warden level
17 responsible for at least -- I was aware they had left, but
18 I don't know whether they tried to contact them or asked
19 to be contacted. I don't know any of that information.

20 **Q. (By Ms. Carlyle) Okay. I know, but I'm trying to**
21 **figure out who does so we can ask that person.**

22 **A.** I do not know.

23 **Q.** **Okay. You said might be the deputy warden?**

24 **A.** It could be a deputy warden, yes.

25 **Q.** **So who are the deputy wardens?**

Page 98

1 A. The two deputy wardens -- the one -- the one was
2 in the room with me, so I know it was not him. The other
3 one is Jason Lewis.

4 **Q. And what was Jason Lewis's job on the day of the**
5 **execution?**

6 A. Specifically, I don't know. He was coordinating
7 things, managing the security operation, things like that
8 and moving -- you know, he had some involvement with
9 moving witnesses and things like that.

10 **Q. Okay. But he would be the person that you would**
11 **ask if you wanted the answer to that question?**

12 A. Yes.

13 **Q. Okay. Did you ask him before you did your**
14 **interrogatory responses?**

15 A. No.

16 **Q. Okay. Are you aware that Joseph Franklin had**
17 **requested someone to be there as a minister for him as a**
18 **witness?**

19 A. I'm not specifically aware of his requests, no.

20 **Q. Okay. Let's take a look at page 1336.**

21 A. Okay.

22 **Q. Does that indicate that he's requested a**
23 **minister?**

24 A. It says ministerial counselor, Tom Cummins, just
25 the name on there.

Page 99

1 Q. Okay. And was Mr. Cummins there when

2 **Mr. Franklin was executed?**

3 A. I do not believe so.

4 Q. In fact, none of Mr. Franklin's witnesses were
5 **there, were they?**

6 A. No.

7 Q. Who would have been in -- you know, physically
8 **in a position to communicate with the witnesses when they**
9 **left?**

10 A. There were staff members assigned to stay with
11 them. I don't know those names.

12 Q. **If they had -- if the witnesses had said**
13 **to the staff members we are leaving, but we would like to**
14 **be contacted if things change, what would the re -- how**
15 **should the staff members have responded?**

16 A. How should -- they should have said give me a
17 phone number, I can call you.

18 Q. **In the event there was a pretty short**
19 **interval between the expiration of the stay of execution**
20 **and the actual execution, correct?**

21 A. Pardon?

22 Q. **Mr. -- when Mr. Franklin was executed, he was**
23 **executed pretty quickly after the stay of execution was**
24 **vacated?**

25 MR. HANSEN: Objection, form of the question.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 113 of 331
Appellate Case: 14-1193 Page: 99 Date Filed: 01/28/2014 Entry ID: 4118269

Page 100

1 It's ambiguous as to what quickly is. You can answer to
2 the degree you can.

3 A. I believe it was less than an hour, yes.

4 Q. (By Ms. Carlyle) Okay. Why was it decided to
5 obtain a prescription for the Pentobarbital?

6 MR. HANSEN: I'm going to -- objection to the
7 form of the question in that it lacks foundation.

8 A. I believe the pharmacy -- the pharmacy required
9 a prescription.

10 Q. (By Ms. Carlyle) Okay. And how did you -- how
11 did you, meaning the -- how did the Department of
12 Corrections determine who would write the prescription?

13 A. Mr. Briesacher came up with the name of the
14 person that would -- the doctor that would do so.

15 Q. Did you ask M3 to write the prescription?

16 A. Pardon?

17 Q. Did you ask M3 to write the prescription?

18 A. I did not, no.

19 Q. Did anyone, to your knowledge?

20 A. I don't know that.

21 Q. Would there be any reason, if M3 had been
22 willing to write the prescription, why you shouldn't?

23 A. I don't know.

24 Q. Okay. Do you know how many -- do you know
25 anything about the process that Mr. Briesacher went

1 **through to come up with a name?**

2 A. No.

3 **Q. Did you take bids for that job?**

4 A. I did not, no.

5 **Q. Did Mr. Briesacher?**

6 A. I don't know.

7 **Q. Is the person who writes the prescription
8 licensed in Missouri?**

9 MR. HANSEN: Hang on a second. I am going to
10 object to that question for the reasons we've talked about
11 earlier about the fact that the answer to that question
12 could lead to information that would identify him and he's
13 been named as a member of the execution team and we've
14 asserted that that identity is a state secret. So I'm
15 objecting to that question and instructing him not to
16 answer.

17 MS. CARLYLE: Okay.

18 **Q. (By Ms. Carlyle) When does the prescriber's
19 medical license expire? Can you give me that date?**

20 A. I do not have that in front of me.

21 MR. HANSEN: I'm going to object to that
22 question. I am unsure whether that information could lead
23 to the identity of the prescriber, but because similar
24 facts have apparently led to the discovery or purported
25 discovery of the identity of the pharmacy, I'm going to

1 object.

2 MS. CARLYLE: And direct him not to answer.

3 MR. HANSEN: Direct him not to answer. He
4 certainly can tell you whether or not he knows the answer
5 to that question, but I'm going to direct him not to
6 answer the question.

7 A. I have seen the license, but I do not know the
8 date.

9 Q. (By Ms. Carlyle) Okay. Did the person who
10 prescribed the -- first of all, was it the same person who
11 prescribed the Pentobarbital for both Mr. Franklin and
12 Mr. Nicklasson?

13 A. Yes.

14 Q. Did that person examine Mr. Franklin or
15 Mr. Nicklasson before he wrote the prescription?

16 MR. HANSEN: Objection to the form of the
17 question because it lacks foundation.

18 A. No.

19 Q. (By Ms. Carlyle) No, he didn't?

20 A. No.

21 Q. Did he examine Mr. Franklin or Mr. Nicklasson's
22 medical records before writing the prescription?

23 A. No.

24 Q. There are a bunch of copies of the
25 prescriptions, but let's take a look at 1254. And is the

1 **date on the prescription redacted?**

2 A. No.

3 **Q. Can we see it?**

4 A. I see it as 11-12 of '13.

5 MR. HANSEN: I can see it on my copy.

6 MS. CARLYLE: Can I come look at your copy?

7 MR. HANSEN: Sure. For the record, you're
8 looking at your monitor on your computer.

9 MS. CARLYLE: I'm looking at my monitor on my
10 computer and it's not -- oh, I see. Okay. That's fine.

11 **Q. (By Ms. Carlyle) And the other redactions, I
12 assume, are the -- are things that would identify the
13 prescriber; is that true?**

14 A. Yes.

15 **Q. The prescription that we have there says, "SIG
16 as ordered per death warrant;" is that a fair reading of
17 what's on there?**

18 A. Yes.

19 **Q. And whose language is that? Who -- is that
20 something that the prescriber came up with to put on there
21 or something that the prescriber was directed to put on
22 there by you or someone else?**

23 A. That is the prescriber's language.

24 **Q. Okay. Was -- as I said, there are lots of
25 copies in here. Was there more than one prescription**

Page 104

1 **issued for Mr. Franklin -- you know, per patient for**
2 **Mr. Franklin and Mr. Nicklasson?**

3 A. There were generally just the -- two, one for
4 five grams each.

5 **Q. There were two prescriptions, one for five grams**
6 **each?**

7 A. Yes.

8 **Q. Why were there two?**

9 A. That's the way we asked them to do it.

10 **Q. Why did you ask them to do it that way?**

11 A. That's -- that was the way we asked them.

12 **Q. But, I mean, they -- if you wanted 10 grams, why**
13 **didn't you ask them to issue a prescription for 10 grams?**

14 A. Mr. Briesacher would have to answer that
15 question. That was the way he asked that it be done.

16 **Q. Okay. Page 1262. Is that the agreement between**
17 **the Department of Corrections and the prescriber?**

18 A. Yes.

19 **Q. Okay. Paragraph two says, "The contractor will**
20 **provide the Department, upon request, with the requested**
21 **prescriptions in the name of the offender to be executed."**
22 **Does that give the prescriber any medical discretion to**
23 **refuse to issue a prescription?**

24 MR. HANSEN: Object to the form of that
25 question. I think it's vague, confusing and calls perhaps

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 118 of 331
Appellate Case: 14-1193 Page: 104 Date Filed: 01/28/2014 Entry ID: 4118269

Page 105

1 for a legal conclusion and an expert opinion. Answer to
2 the degree you can.

3 A. It simply says contractor will provide the
4 Department with the requested prescriptions.

5 Q. (By Ms. Carlyle) Okay. So in order to -- in
6 order to fulfill his contract when he's requested to do
7 so, he has to write the prescription?

8 A. That's what it says.

9 Q. Okay. How much Pentobarbital -- compounded
10 Pentobarbital does the Department of Corrections have on
11 hand at the moment?

12 A. Ten grams.

13 Q. And is that for Mr. Smulls' execution?

14 A. Yes.

15 Q. Is new Pentobarbital ordered for each execution?

16 A. Yes.

17 Q. If that -- and that Pentobarbital is scheduled
18 to be used on January 29?

19 A. Yes.

20 Q. If Mr. Smulls -- if Mr. Smulls' execution
21 doesn't occur, what would happen to that Pentobarbital?

22 A. It would be destroyed.

23 Q. You indicated in your interrogatory response
24 that the pharmacy said to store the Pentobarbital at room
25 temperature?

1 A. That's correct.

2 Q. Okay. First of all, to whom was that
3 communication made?

4 A. To me.

5 Q. Okay. Was it in writing?

6 A. No. It was -- that was a verbal statement to me
7 when I asked how to store it.

8 Q. Okay. Recognizing that you're not going to --
9 let me put it this way. Do you know who told you that?

10 A. Yes.

11 Q. Okay. I understand you're not going to tell me
12 now, but if you were directed to -- if you were told that
13 the identity were not privileged, you wouldn't say I don't
14 know who told me that. You know.

15 A. Yes.

16 Q. You also said that you had been told that the
17 Pentobarbital expires 30 days after compounding; is that
18 correct?

19 A. Yes.

20 Q. Is there a writing that reflects that?

21 A. There's not a writing that I know of. It is
22 in -- it is clearly reflected in the labels of the discard
23 date and what -- it confirms what I've been told, that it
24 is good for 30 days.

25 Q. Okay. But you -- were you also told that

1 **verbally?**

2 A. By Mr. Briesacher.

3 **Q. Okay. You weren't told that by anyone at the**
4 **pharmacy?**

5 A. It's -- I believe the subject came up in
6 conversations regarding the discard date and it was -- in
7 our conversations, it was generally assumed that we had
8 to -- I could not request the pharmacist to compound
9 Pentobarbital over 30 days before an execution date.

10 **Q. Okay. And do you know who you had that**
11 **conversation with?**

12 A. Yes.

13 **Q. Okay. Has anyone explained to you why it lasts**
14 **30 days rather than some other length of time?**

15 A. Not in great detail. I know bits and pieces,
16 but not in great detail.

17 **Q. What are the bits and pieces that you know?**

18 A. Simply -- there's references to ensuring that
19 it's sterile, there's things like that, that it's -- my
20 understanding is that is a conservative estimate, that it
21 is still an appropriately prepared substance well beyond
22 that, but that's the day they picked to use by.

23 **Q. Okay.**

24 MR. HANSEN: Elizabeth, it is 5:15 and we've
25 been going a pretty good chunk here.

1 MS. CARLYLE: True.

2 MR. HANSEN: Could we take a quick five-minute
3 break?

4 MS. CARLYLE: Let's go off the record for a
5 second.

6 (Off the record.)

7 MS. CARLYLE: Okay. Back on the record.

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

[REDACTED] [REDACTED]

20 Q. Okay. Now, is there other compounded
21 Pentobarbital used for training?

22 A. No.

23 Q. Okay. So the -- when the -- when the training
24 occurs, it's not done with Pentobarbital?

25 A. The director can give us authority to use saline

1 solution.

2 Q. And is that what's been happening with respect
3 to the --

4 A. That is what happened the training we had prior
5 to the executions, yes.

6 Q. Okay. So has there only been one training prior
7 to the executions?

8 A. Yes.

9 Q. Okay. Now, you've ordered -- you're ordering
10 Pentobarbital, I guess, in batches of ten grams, but
11 there's some additional Pentobarbital that's needed for
12 testing, isn't there?

13 A. That's my understanding, yes.

14 Q. Okay. So what -- so what's the actual amount
15 that you get from the laboratory -- from the pharmacy?

16 A. I get 10 grams.

17 Q. Okay. Okay. So if we look at page 1311, let's
18 do that. And is that -- is that the log of -- that -- of
19 the chain of custody for Pentobarbital before the
20 execution of Joseph Franklin?

21 A. Yes.

22 Q. Okay. So it tells us that on November 19 at
23 2105, which I think is 9:05 P.M., isn't it?

24 A. I think so, yes.

25 Q. Mr. Spillane is nodding his head vigorously.

Page 110

1 Okay. That M3 received the Pentobarbital, correct?

2 A. That's correct.

3 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

11 Q. No, but I mean the Pentobarbital itself, is it
12 in syringes or bottles?

13 A. Oh, it's in syringes.

14 Q. So it comes to you in syringes?

15 A. Yes.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Page 111

1 MS. CARLYLE: Would you mark that as 7 for us,
2 please?

3 (Exhibit No. 7 marked for identification.)

4 MR. HANSEN: What is she marking, 7, did you
5 say?

6 MS. CARLYLE: She is marking 7 and it is the
7 affidavit of Dave Dormire filed, according to the ECF
8 notations at the bottom, on December 3, but also, I think,
9 filed in the Missouri Supreme Court on November 15 of 2002
10 by the State. Do you need to see it before I show it to
11 him?

12 MR. HANSEN: Yeah, I do.

13 MS. CARLYLE: Okay.

14 MR. HANSEN: There you go.

15 MS. CARLYLE: Okay.

16 Q. (By Ms. Carlyle) What was the -- the purpose of
17 this affidavit?

18 A. My memory was it was to talk about the issue of
19 a peripheral line versus a central line.

20 Q. Okay. And why did you feel the need to talk
21 about that?

22 A. It was my understanding there was some confusion
23 over the way it was worded in our protocol.

24 Q. In paragraph six of the -- of your affidavit on
25 page one of Exhibit 7 you say, "If the prisoner's medical

Page 112

1 condition allows, both the primary and secondary lines
2 will be inserted as peripheral lines." What did you base
3 that statement on? You're not going to insert -- I
4 understand you're not a physician, so you're not inserting
5 any lines.

6 A. Sure, sure. That was -- that was to allow the
7 medical personnel to determine the appropriate placement
8 of the line.

9 Q. Well, the protocol itself says, and you quote it
10 in paragraph five, medical personnel shall determine the
11 most appropriate locations for intravenous lines, does it
12 not?

13 A. It does.

14 Q. Okay. So was this intended to give them
15 additional criteria to use?

16 A. My intent of this was to just simply clear up --
17 there must have been some -- I believe there was some
18 confusion over how it was worded, but this was to give
19 them clearer direction on it.

20 Q. Okay. Now, is this affidavit now part of the
21 execution protocol?

22 A. Pardon?

23 Q. Is this affidavit now part of the execution
24 protocol?

25 A. I don't believe this affidavit itself is, no.

1 Q. **Okay.**

2 A. It may be worded that way, but I don't -- I
3 don't remember.

4 Q. **Okay. Is there some reason why this statement**
5 **about the -- both lines being peripheral if the condition**
6 **allows isn't in the protocol?**

7 A. Pardon?

8 Q. **Why isn't that statement, "If the prisoner's**
9 **medical condition allows, both primary and secondary lines**
10 **will be inserted as peripheral lines," why isn't that**
11 **statement in the protocol?**

12 MR. HANSEN: Objection, form of the question in
13 that it lacks foundation.

14 A. I can't answer exactly why it isn't written in
15 the protocol. It has been communicated to the medical
16 personnel, but I can't answer that question.

17 Q. **(By Ms. Carlyle) Did you consult with a physician**
18 **before you prepared this affidavit?**

19 A. I didn't personally. There was some discussion,
20 but I believe Mr. Briesacher did the consulting.

21 Q. **Okay. Did you intend that this affidavit**
22 **supersede M3's medical judgment about the most appropriate**
23 **location for intravenous lines?**

24 A. No.

25 Q. **Okay. Let's talk about the laboratory for a**

Page 114

1 little bit. Is the laboratory a different business than
2 the pharmacy? Are the two connected, the two businesses?

3 MR. HANSEN: I'm going to object, again, for the
4 same reasons that you now have indicated that -- today
5 that you know who that pharmacy -- that you personally
6 know who that pharmacy is and the answer to that question
7 might identify who the lab is, which we asserted is --

8 MS. CARLYLE: Well, I am under a court order,
9 Mr. Hansen, not to reveal that information and I don't
10 intend to and I've known it for some time. So if you want
11 me to go get a lawyer who doesn't know who -- who didn't
12 read that to ask that question, I will. But I think --

13 MR. HANSEN: It's not a question of what you
14 know today. It's a question of what is going to be in the
15 record. And that's why I'm inserting the objection --

16 MS. CARLYLE: Okay. But what you just mentioned
17 was that you knew I knew. That's not in the record.

18 MR. HANSEN: I don't know if you know. You told
19 me you know.

20 MS. CARLYLE: I understand that. But the words
21 that I know are not in the record and won't be. I've told
22 you they won't be and they won't be and if they were, of
23 course, you'd have the right to have the record sealed and
24 we could argue about that. But the fact is they're not.
25 So I think we're entitled to know, given the fact that

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 128 of 331
Appellate Case: 14-1193 Page: 114 Date Filed: 01/28/2014 Entry ID: 4118269

Page 115

1 your position is that these drugs are validated by
2 testing, whether there is a connection between the
3 laboratory that tests them and the pharmacy that makes
4 them. And that's what I'm asking.

5 MR. HANSEN: Let me take a moment and discuss it
6 with my co-counsel and make a decision. Okay. We'll
7 withdraw the objection as you described your purpose.

8 MS. CARLYLE: Okay.

9 MR. HANSEN: And allow him to answer.

10 A. Now I've got to ask you to restate.

11 Q. (By Ms. Carlyle) Fair enough. The question is is
12 there a -- is there a business -- is there a connection
13 between the laboratory and the pharmacy other than that
14 the laboratory is doing testing for the pharmacy? Is
15 there a business connection between the two entities?

16 A. I do not know.

17 Q. Okay. How is the laboratory chosen?

18 A. I do not know that.

19 Q. There is a contract between the laboratory -- or
20 is there a contract between the laboratory and the
21 Department of Corrections?

22 A. I'm -- I do not know that.

23 Q. Okay.

24 MS. CARLYLE: Can we go off the record for a
25 second?

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 129 of 331

Appellate Case: 14-1193 Page: 115 Date Filed: 01/28/2014 Entry ID: 4118269

Page 116

1 (Off the record.)

2 Q. (By Ms. Carlyle) Okay. Well -- okay. I think
3 we'll kind of get to it because I think we had some
4 evidence of payments to the laboratory, but we'll see when
5 we get a little further on. Take a look, please, at page
6 1294. Can you tell me what sort of information is
7 redacted on that document?

8 A. It appears to be a date that it's valid, a
9 certification number and another certification number.

10 Q. Okay.

11 MR. HANSEN: Can we take just a minute?

12 MS. CARLYLE: Sure.

13 (Off the record.)

14 Q. (By Ms. Carlyle) Do you -- are you familiar with
15 the business organization the American Association for
16 Laboratory Accreditation?

17 A. Yeah.

18 Q. Do you know whether anyone -- did you determine
19 whether accreditation by the American Association for
20 Laboratory Accreditation was a reflection of the quality
21 of a laboratory?

22 A. I did not.

23 Q. Okay. Looking at page 1306, is the -- okay. I
24 guess one thing that I find that's odd about this is that
25 it appears that there's no name on this accreditation

Page 117

1 **redacted or unredacted. Is that the case or was it**
2 **somehow redacted in white?**

3 A. I don't know the answer to that.

4 Q. **Is there a way to look at the unredacted**
5 **document and see?**

6 MR. HANSEN: I don't know if you know if you
7 have it handy, but --

8 A. I don't know that I have that document, but I
9 assume we do somewhere. I don't have it in my little --

10 MR. HANSEN: And I suspect Matt might know the
11 answer to that. Matt Briesacher might know the answer to
12 that question.

13 Q. **(By Ms. Carlyle) Is the accreditation reflected**
14 **on page 1306 and the accreditation reflected on page 1294**
15 **for the same laboratory?**

16 A. That would be my belief, yes.

17 Q. **Okay. And that would be the laboratory that's**
18 **been conducting the analysis reports that we have been**
19 **receiving?**

20 A. Yes.

21 Q. **Okay. Tell us how that -- how that testing**
22 **process works. Do -- does -- where does the laboratory**
23 **get the drugs to test? Do they get it from the DOC or**
24 **from the pharmacy or where?**

25 A. They are sent drugs from the pharmacist.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 131 of 331
Appellate Case: 14-1193 Page: 117 Date Filed: 01/28/2014 Entry ID: 4118269

Page 118

1 Q. Okay. So when part -- when the drugs are sent
2 from the pharmacy for laboratory testing, are they the --
3 are they part of the same batch, for want of a better
4 word, then as the drugs that are going to be sent to the
5 DOC?

6 A. That's my understanding.

7 Q. Okay. So who's responsible for getting the --
8 for getting the drugs to the -- I mean, is there a
9 particular person that you're aware of, even if you're not
10 willing to identify him or her, who's responsible for
11 transmitting the drugs to the laboratory?

12 A. Yes. It's M6.

13 Q. Okay. And is there a particular person at the
14 laboratory who is responsible for receiving them?

15 A. I do not know that.

16 Q. Does the -- is there someone at the laboratory
17 that has an M number?

18 A. No.

19 Q. Okay. On page 1257, first of all there's a --
20 there is a redaction at the top that's listed as client.
21 Again, without -- I know you're probably not going to tell
22 me what's there, but what sort of -- is that the
23 pharmacist, the pharmacy, the -- what sort of thing --
24 what sort of information is crossed out there?

25 A. I'm not sure.

1 Q. Okay. Why is the lot number crossed out?

2 A. I don't know exactly.

3 Q. Do you know what's crossed out at the lower
4 right-hand corner?

5 A. Not specifically, no.

6 Q. Okay. On 1266, can you tell us the nature of
7 the information that's re -- well, why the item number and
8 loss number are redacted?

9 A. No.

10 Q. Do you notice on that document that it reflects
11 a manufacturing date of 2011 and an expiration date of
12 2016?

13 A. Yes.

14 Q. At the upper left-hand corner?

15 A. Yes.

16 Q. So what is -- is that -- does this document
17 reflect an analysis of compounded Pentobarbital?

18 A. I can't tell you that. I -- from the dates, I
19 would assume not.

20 Q. Okay. The bottom of that document says, "This
21 analysis is not to be construed as a warranty, expressed
22 or implied." What does -- do you -- what does that mean
23 to you?

24 A. I take it the way it's worded, it's not a
25 warranty.

Page 120

1 Q. Okay. So essentially they're saying this is our
2 analysis, but we're not saying that -- we're not willing
3 to give you a warranty that it's true?

4 A. I can't answer your question on that.

5 Q. Do you know what laboratory or -- performed the
6 analysis reflected in 1266?

7 A. I am aware of the name of the laboratory, yes.

8 Q. Okay. So is it -- is that the same laboratory
9 that's doing the other analyses?

10 MR. HANSEN: I'm going to object to the form of
11 the question. It's vague. Just to clarify --

12 MS. CARLYLE: Sure.

13 MR. HANSEN: -- what you mean by the other.

14 Q. (By Ms. Carlyle) Let me put it this way. In the
15 collection of discovery that we've been given, there are
16 numerous analysis reports of various kinds. I mean, maybe
17 this is an easy question. Are they all performed by the
18 same laboratory?

19 A. I would guess not.

20 Q. Okay.

21 MR. HANSEN: Are you talking about the ones
22 related to Pentobarbital?

23 MS. CARLYLE: I don't think there are any
24 analyses -- I don't think there are any analyses that
25 aren't related to pentobarbital.

Page 121

1 MR. HANSEN: I think that's right, I'm just not
2 entirely sure.

3 MS. CARLYLE: Well, I'm --

4 **Q. (By Ms. Carlyle) Are all the analyses of**
5 **Pentobarbital performed by the same laboratory? And**
6 **you're saying you don't think they are.**

7 A. The analysis of the compounded Pentobarbital,
8 yes.

9 **Q. Okay. But we're not sure, for example, looking**
10 **at this document, 1266, exactly -- whether that's an**
11 **analysis of compounded Pentobarbital or not?**

12 A. That's correct.

13 **Q. And we also don't know what -- whether -- what**
14 **lab prepared this report; is that true?**

15 A. I'm not sure, no.

16 **Q. Okay. If you looked at an unredacted copy, do**
17 **you think that would shed some light on that?**

18 A. I don't know.

19 **Q. Okay. Similar questions about 1268. This is**
20 **entitled Certificate of Analysis and reflects a**
21 **manufacture date of May 11, 2013 and an expiration date**
22 **of -- maybe June 11, I don't know.**

23 MR. HANSEN: Which page are you on now?

24 MS. CARLYLE: I'm on page 1268.

25 **Q. (By Ms. Carlyle) And an expiration date of 2018.**

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 135 of 331
Appellate Case: 14-1193 Page: 121 Date Filed: 01/28/2014 Entry ID: 4118269

Page 122

1 Do you think that -- I mean, I guess let me ask you, would
2 your responses about this one be the same as they were
3 about the -- about 1266?

4 A. Yes.

5 Q. Okay. What about 1285? Is that an analysis of
6 compounded Pentobarbital?

7 A. I believe so.

8 Q. Okay. Now, the redacted material at the top,
9 would -- is that the name of the laboratory?

10 A. Yes, I believe so.

11 Q. Okay. Then the client is redacted and what --
12 you know, what's that? Is that the pharmacy or the
13 prescriber or --

14 A. That would be my belief, that that's the
15 pharmacy.

16 Q. So in this context, the laboratory sees its
17 client as the pharmacy? It's performing --

18 MR. HANSEN: Objection --

19 Q. (By Ms. Carlyle) It's performing the analysis for
20 the pharmacy.

21 MR. HANSEN: Object to the form of the question.
22 This witness doesn't know what the pharmacy sees the lab
23 as. It calls for speculation on the part of this witness.

24 MS. CARLYLE: Okay. I'm actually -- what I
25 actually said was based on this document from the

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 136 of 331
Appellate Case: 14-1193 Page: 122 Date Filed: 01/28/2014 Entry ID: 4118269

Page 123

1 laboratory, the laboratory appears to see the pharmacy as
2 its client. I agree that the pharmacy doesn't know -- we
3 don't know what the pharmacy thinks.

4 MR. HANSEN: Yeah, I object to the form of the
5 question.

6 MS. CARLYLE: Okay.

7 MR. HANSEN: Go ahead.

8 Q. (By Ms. Carlyle) And then, once again, you don't
9 know why the lot number was removed?

10 A. I do not.

11 Q. And do you -- and you still don't know what's
12 redacted at the bottom right.

13 A. No, I don't.

14 Q. Okay. Let's take a look at page 1295. And this
15 is headed Microbiology Report. What's this an analysis
16 of?

17 A. I believe it is the Pentobarbital sodium
18 solution.

19 Q. Okay. What -- what batch of Pentobarbital
20 sodium solution is this an analysis of, can we tell?

21 A. What batch?

22 Q. I mean, is it Pentobarbital sodium that's
23 intended for DOC?

24 A. That would be my belief, yes.

25 Q. Okay. And at the bottom of this report, it

Page 124

1 says, "The results reported relate only to the sample that
2 was tested," correct?

3 A. Yes.

4 Q. Let's take a look at 2048.

5 MR. HANSEN: You said 1208?

6 MS. CARLYLE: 2048.

7 MR. HANSEN: 2048.

8 Q. (By Ms. Carlyle) Is this a -- this is a letter to
9 Mr. Briesacher. Is it -- I think we've talked about it
10 before. Is it -- does it reflect a bid by a laboratory?

11 A. It says attached is the -- you will find the
12 requested quotation.

13 Q. All right. And does the fact that it's been
14 redacted mean that it was the -- it was a successful
15 quotation, that is, that it was one that was accepted or
16 would you have redacted it anyway?

17 A. I can't answer that specific question.

18 Q. Okay. If you looked at the unredacted document,
19 could you tell if it was from the lab that's actually --
20 that's actually performing the testing?

21 A. I believe so.

22 MS. CARLYLE: Okay. Okay. Let's go off the
23 record for a minute here.

24 MR. HANSEN: While we're still on the record,
25 just so it's reflected, I don't know if you'll put it in

Page 125

1 here, but it's 6:05 P.M. now, just so we remember.

2 MS. CARLYLE: Okay.

3 (Off the record.)

4 Q. (By Ms. Carlyle) When did -- when did you get the
5 Pentobarbital for Mr. Smulls' execution?

6 A. Yesterday.

7 Q. Okay. Let's take a look at some money things.

8 1295. Okay. 1295 -- 1296.

9 A. 1296.

10 Q. 1296, I'm sorry.

11 A. Okay.

12 Q. Okay. 1296 reflects a payment of \$1,200 to --
13 for the Joseph Franklin execution; is that correct?

14 A. Yes.

15 Q. And are these documents used -- they're called
16 Confidential Execution Team Member Receipt. Are those
17 used to pay those members of the execution team whose
18 identities the Department is protecting?

19 A. Yes.

20 Q. So the redacted material in the middle
21 presumably identifies the person who got the payment?

22 A. Yes.

23 Q. So this person obtained -- got \$1,200 and that
24 was disbursed by Melissa Rohrbach?

25 A. Rohrbach is the pronunciation.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 139 of 331
Appellate Case: 14-1193 Page: 125 Date Filed: 01/28/2014 Entry ID: 4118269

Page 126

1 Q. And does Miss Rohrbach work at -- work in this
2 office or does she work in ERDCC or --

3 A. She works in our finance office downstairs.

4 Q. Okay. So what was the job of the person who got
5 \$1,200? Is that M2, M3?

6 A. It's M2.

7 Q. That's M2. Okay. Turning to 1297.

8 A. Yes.

9 Q. I guess this is -- this is a -- a voucher for
10 \$3,000 for Joseph Franklin's execution. Who gets \$3,000?

11 A. This is M3.

12 Q. That's M3. Okay. Let's switch. There's --
13 in -- let's look at 2058, I think. 2057?

14 MR. HANSEN: 2058, is that what --

15 MS. CARLYLE: Actually, 2057.

16 A. Okay.

17 Q. (By Ms. Carlyle) Okay. Who gets -- this is for
18 the -- this is a payment of \$11,091 for the execution of
19 Allen Nicklasson. Who gets that?

20 A. That's the pharmacy.

21 Q. Okay. Now, the pharmacy's bid for the
22 pentobarbital was \$8,000, was it not?

23 A. That was correct.

24 Q. So what's the extra \$3,091 for?

25 A. That was for testing.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 140 of 331
Appellate Case: 14-1193 Page: 126 Date Filed: 01/28/2014 Entry ID: 4118269

Page 127

1 Q. Okay. So the pharmacy collects the testing fee?

2 A. Yes.

3 Q. Okay. Let's look at 1300.

4 MS. CARLYLE: I promise by tomorrow I'll have
5 these all on one thing and I won't have to do this.

6 MS. BORESI: You know M3 is going to be at a
7 remote location tomorrow and we won't have a way to get
8 documents to him.

9 MS. CARLYLE: Okay. He probably -- there
10 probably aren't a whole lot of documents he's going to
11 need, but that's an interesting issue. I think last time
12 we got him some.

13 MS. BORESI: But you did it like a week in
14 advance.

15 MS. CARLYLE: Yeah. If we'd have them a week in
16 advance, it would have been easier.

17 Q. (By Ms. Carlyle) Okay. 1300 is what? What is
18 1300?

19 A. That's a -- the receipt at the pharmacy.

20 Q. Okay. And do we have -- and that's November 13;
21 is that right? It's at the top.

22 A. Oh, yes; yes.

23 Q. I'm not trying to be tricky. Is that a receipt
24 that -- well, let me just ask you this. I mean, how does
25 the pharmacy get paid? Does it -- do you send them a

1 **check or what happens?**

2 A. I take them cash.

3 Q. **You take them cash. Okay. Is that also true**
4 **for M2 and M3?**

5 A. Yes.

6 Q. Okay. And the -- so the \$8,000 payment, the
7 **\$11,000 payment were cash payments?**

8 A. Yes.

9 Q. 1298. 1298 is a receipt for \$300. Who gets
10 **\$300?**

11 A. M5.

12 Q. Okay. And M5 is?

13 A. The --

14 Q. **Prescriber?**

15 A. Prescriber.

16 Q. Okay. And who is Susan Wood?

17 A. Susan is in our finance office.

18 Q. Okay. And is that -- so is that also a cash
19 **payment?**

20 A. Yes.

21 Q. Okay. What -- is there a -- is there an
22 internal document that says that these people are to be
23 paid in cash? How does that -- how does that happen? Who
24 made the decision to pay them in cash, I guess is the
25 question?

Page 129

1 A. You're going back many, many years. I don't --

2 I don't know.

3 Q. Well, they -- you provide the Internal Revenue
4 Service with proof that they've been paid, do you not?

5 A. I do not know.

6 Q. Okay. So you don't know whether the Department
7 of Corrections issues a 1099 for someone that it pays --

8 A. I don't know.

9 Q. -- \$3,000 in cash? Let's go back to here.

10 **2494.**

11 MR. HANSEN: I'm sorry, what page?

12 MS. CARLYLE: 2494.

13 A. Are you sure?

14 Q. **(By Ms. Carlyle)** Maybe not, no. It's not 2494.

15 **It is --**

16 MR. HANSEN: There is no 2494, right?

17 MS. CARLYLE: You're right. Not anymore. Let
18 me see something. Well, okay. I thought I fixed that
19 problem.

20 Q. **(By Ms. Carlyle)** Well, actually, I tell you what
21 let's do, let's look in -- we knew we had this box here
22 for a reason. Let's see what we've got here. What I'm
23 doing -- okay. Okay. Okay. I'm handing you Exhibit 2,
24 which is a disk containing numerous documents, pages 2492
25 through 2499.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 143 of 331
Appellate Case: 14-1193 Page: 129 Date Filed: 01/28/2014 Entry ID: 4118269

Page 130

1 MR. HANSEN: I'm sorry, what did you say?

2 MS. CARLYLE: 2492 through 2499.

3 MR. HANSEN: 2492 to 2499.

4 THE WITNESS: Do you want to see those?

5 MR. HANSEN: What's that?

6 THE WITNESS: Do you want to see those?

7 MR. HANSEN: I do want to see those because I do
8 not have copies of those. They're at my office because
9 they got scanned. But we do need to at this point,
10 Elizabeth, identify the fact that the page numbers that
11 we're referring to now are not a part of Exhibit 1.

12 MS. CARLYLE: That's why I said they were part
13 of Exhibit 2.

14 MR. HANSEN: Oh, you did. Okay. I want to make
15 sure that was clear in the record. Okay.

16 MS. CARLYLE: Unfortunately, what's happening
17 here is that my computer does not want to read this disk.
18 I'll give it another try here.

19 MR. HANSEN: Off the record.

20 (Off the record.)

21 (Exhibit No. 2 marked for identification.)

22 Q. (By Ms. Carlyle) 2492, can you tell us what 2492
23 is?

24 MS. CARLYLE: Wait a minute, he's still looking
25 at them. I'm sorry. Forgive me.

Page 131

1 A. 2492 is a memo from myself to Lenny Lenger, the
2 comptroller in the fiscal management unit.

3 **Q. (By Ms. Carlyle) And what is it asking Mr. -- I'm**
4 **sorry, is it Mr. --**

5 MR. HANSEN: You want to spell that for --

6 A. Lenger. Oh, Lenny, L-E-N-N-Y, Lenger,
7 L-E-N-G-E-R.

8 **Q. (By Ms. Carlyle) And is that Mr. or Miss?**

9 A. Mister.

10 **Q. Mister, okay. What are you asking Mr. Linger to**
11 **do for you?**

12 A. I am requesting money for payment for execution
13 services to two contract providers and then again in the
14 second paragraph to four contract providers.

15 **Q. Okay.**

16 A. For varying amounts.

17 **Q. Okay. And are those the four contract providers**
18 **we've just -- well, who are the four contract providers by**
19 **function?**

20 A. M2, M3, M2, M3, M5 and M6.

21 **Q. Okay. And so that's -- that's the way you --**
22 **you asked him to give you, you know, 16, \$17,000 in cash?**

23 A. (Witness nodding.)

24 **Q. Okay. Turning to page 2494, can you tell us**
25 **what that is?**

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 145 of 331
Appellate Case: 14-1193 Page: 131 Date Filed: 01/28/2014 Entry ID: 4118269

Page 132

1 A. This -- this would appear to be a ledger that
2 they use. I don't -- I'm not familiar with what this is.

3 **Q. Who's they?**

4 A. The fiscal management unit.

5 **Q. Okay.**

6 A. Yeah.

7 **Q. So you don't -- I mean, is there any -- who in**
8 **the fiscal manager -- management unit would I want to ask**
9 **if I wanted to know who that was?**

10 A. Mr. Lenger would know what this is.

11 **Q. Okay. Okay. Next page, 2095 -- 2495. This**
12 **reflects \$5,000 for medical consulting. Who's being**
13 **consulted there?**

14 A. I'm -- I'm not up on these type of documents. I
15 don't know. I'm going to believe this was moving money
16 into an account, but I don't know that.

17 **Q. Okay. So who -- so whose signature do we have**
18 **down on the bottom there?**

19 A. The signature at the bottom is Doug Nelson.

20 **Q. And who is Doug Nelson?**

21 A. Doug Nelson is the commissioner of Office of
22 Administration.

23 **Q. Okay. And is that part of the Department of**
24 **Corrections or --**

25 A. No, no.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 146 of 331
Appellate Case: 14-1193 Page: 132 Date Filed: 01/28/2014 Entry ID: 4118269

Page 133

1 **Q. Okay. It's part of the State of Missouri?**

2 A. No, he is the -- he is the director of the
3 Office of Administration. I'm believing that's his --

4 MR. HANSEN: It's like GSA for the federal
5 government.

6 MS. CARLYLE: Okay.

7 MR. HANSEN: It's over -- the umbrella
8 organization for the state agencies.

9 MS. CARLYLE: Okay.

10 THE WITNESS: It says commissioner of
11 administration signatures.

12 **Q. (By Ms. Carlyle) So 2496 is a requisition, a**
13 **Department of Corrections requisition for \$5,000?**

14 A. Yes.

15 **Q. Which, it looks like Melissa signed.**

16 A. And myself.

17 **Q. And yourself. Okay.**

18 A. Yes.

19 **Q. And so what -- what were you doing there?**

20 A. I was moving money into the fund that we use for
21 this.

22 **Q. The fund that we use for?**

23 A. To pay for execution services.

24 **Q. Okay. And then 2497, is that -- which is**
25 **\$12,500?**

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 147 of 331
Appellate Case: 14-1193 Page: 133 Date Filed: 01/28/2014 Entry ID: 4118269

1 A. It appears to be the same as that \$5,000
2 document earlier.

3 Q. Okay. So is the -- I notice that your
4 requisitions don't call it medical consulting. Is medical
5 consulting just something Mr. Nelson's office seems to
6 have decided to call it?

7 A. I do not know who fills out these forms.

8 Q. Okay. Because conducting an execution is not,
9 in fact, medical consulting, is it?

10 A. No, I wouldn't think so.

11 Q. So -- and then the -- the others I've showed you
12 are basically just other examples of the same thing, true?

13 A. Yes.

14 Q. Okay. Go back to look for 1299, I think. No,
15 actually, we don't need to look at 1299. Okay. Okay.
16 Actually, I've -- let's look at 2399.

17 MR. HANSEN: 99?

18 MS. CARLYLE: 2399, yeah.

19 A. Okay.

20 Q. (By Ms. Carlyle) Okay. And what is this?

21 A. Inventory -- let's see. Eastern Reception
22 Diagnostic Center, Chemical Control Record. It says
23 capital punishment transactions.

24 Q. The only drug that's reflected on here is
25 Pentobarbital, right?

1 A. Yes.

2 Q. Okay. And what units are those where it says
3 four, two and two?

4 A. I -- it's labeled as 100M, slash, 50MG, slash,
5 ML.

6 Q. Right. But that's a concentration, is it not?

7 A. I would believe it's a volume. I don't --

8 Q. Okay. I guess I would read that as 100M
9 whatever they are per 50 milligram per milliliter. Okay.
10 So who -- so I guess we're not sure exactly what the units
11 are. But what we learned from another log was that
12 five grams were -- or five grams were destroyed after the
13 execution, correct?

14 A. That's correct.

15 MR. HANSEN: We're talking about 2399; is that
16 correct?

17 THE WITNESS: Yes.

18 MS. CARLYLE: Yes, yes.

19 Q. (By Ms. Carlyle) Who are the witnesses on the
20 right there?

21 A. Joe Hofmeister and Terry Russell are the first
22 two.

23 Q. The third one looks like Johnston to me, but
24 maybe I'm misreading it.

25 A. Joe Hofmeister is the first one, Terry Russell

Page 136

1 is the second one. Becky Johnston is the first witness on
2 the third item.

3 Q. Oh, I see. Wait a minute.

4 A. Pardon?

5 Q. There are two sets of witnesses and I've got the
6 thing covered. Okay.

7 A. And I do not know the second witness.

8 Q. You can't read that one? That's a worse
9 signature than mine. Okay. So -- but I guess the sum
10 total of this is whatever those units are, the four, the
11 two and the two, by November 21, the Department no longer
12 had any Pentobarbital?

13 A. That's correct.

14 Q. Okay. I actually only have a couple of more.

15 1303. Okay. Tell me what this is, please.

16 MR. HANSEN: Hang on a second. Let me get
17 there.

18 MS. CARLYLE: Oh, sure.

19 MS. BORESI: What was the number, please?

20 MS. CARLYLE: 1303.

21 Q. (By Ms. Carlyle) This appears to be a handwritten
22 document, true?

23 A. You are correct.

24 Q. Do you know whose handwriting it is?

25 A. I do.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 150 of 331
Appellate Case: 14-1193 Page: 136 Date Filed: 01/28/2014 Entry ID: 4118269

1 Q. **And whose is it?**

2 A. It is mine, my handwriting.

3 Q. **Well, then, what can you tell us about it?**

4 A. This is my notes that I used to remind myself of
5 all the documents that I needed to ensure I had.

6 Q. **Okay. So what -- what was -- what's redacted on
7 these notes?**

8 A. Names and phone numbers.

9 Q. **Okay.**

10 A. Addresses.

11 Q. **And are they redacted -- are all those
12 redactions of people that you contend are shielded either
13 as execution team members or state secrets or are they --**

14 A. Yes.

15 Q. **Okay. In the middle it says, "AG's want to run
16 a check." Do you have any idea what that referred to?**

17 MR. HANSEN: Well, I'm going to object to the
18 form, foundation of that question. I don't think it's
19 been -- he hasn't said what that says. I mean, you might
20 ask him that first.

21 Q. **(By Ms. Carlyle) Okay. Does it say, "AG's want
22 to run a check?"**

23 A. That was a note I made to myself indicating
24 that --

25 MR. HANSEN: Just listen to the question.

Page 138

1 Q. (By Ms. Carlyle) Let me stop you just for a
2 **second.**

3 A. Sure.

4 Q. Does it appear to be "AG's want to run a check"?
5 **Am I reading your handwriting correctly?**

6 A. Yes.

7 Q. Now, if you remember what that was about, please
8 **tell us.**

9 MR. HANSEN: Well, I'm going to object at this
10 point unless it relates to legal advice that we, as
11 representatives, told you, but -- can I talk to -- can we
12 talk?

13 MS. CARLYLE: Sure.

14 MR. HANSEN: Just for a moment.

15 THE WITNESS: Sure.

16 (Off the record.)

17 MR. HANSEN: Back on the record. Withdraw the
18 objection.

19 MS. CARLYLE: Okay.

20 MR. HANSEN: You can go ahead and answer.

21 A. That was a note to myself indicating that I was
22 to secure the licenses and things because my note was the
23 Attorney General's Office wanted to make sure that we run
24 checks on those individuals.

25 Q. (By Ms. Carlyle) On what individuals?

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 152 of 331
Appellate Case: 14-1193 Page: 138 Date Filed: 01/28/2014 Entry ID: 4118269

Page 139

1 A. The individuals that I was dealing with.

2 Q. Okay. And can you identify them by function? I
3 understand you're not going to give me their names, but --

4 MR. HANSEN: Give them the pseudonyms.

5 A. The prescribing -- M5 and M6.

6 Q. (By Ms. Carlyle) M5 and M6. Okay.

7 A. Yes.

8 Q. And do you know what check they ran?

9 A. I do not know what all Mr. Briesacher did.

10 Q. Mr. Briesacher, just so we're clear, is not an
11 AG, is he?

12 A. That's correct.

13 MR. SPILLANE: Off the record.

14 (Off the record.)

15 Q. (By Ms. Carlyle) Okay. To clarify, does this
16 note mean that you were being directed by the Attorney
17 Generals to run checks or that you were obtaining this
18 information because the Attorney Generals wanted to run a
19 check?

20 A. My -- I wrote that note because Mr. Briesacher
21 indicated that he wanted to run checks because he was
22 requested to do so by the Attorney General's Office.

23 Q. Okay. Then the only thing I think -- well, I
24 won't say that, but we're coming to the end. Let's take a
25 look at 1304. Can you tell me what that is?

Page 140

1 A. That is the names, addresses, phone numbers and
2 fax numbers and DEA numbers for M5 and M6.

3 Q. Okay. Under what -- are you involved in
4 determining whether prisoners who are awaiting execution
5 will be allowed to have confidential visits with their
6 attorneys or clergy or who makes that determination?

7 A. Generally the warden makes that determination.

8 Q. Okay. Are there any written guidelines about
9 when a confidential -- and by confidential, I mean visit
10 with no one else in the room will be permitted?

11 A. I don't know specifically what all is written.

12 Q. Are you involved in the determination of when
13 the execution can proceed, that is when the determination
14 has been made that there's no legal reason why it can't
15 proceed?

16 A. No.

17 Q. Is that Mr. Lombardi's call?

18 A. Yes.

19 MS. CARLYLE: Okay. I believe I'm ready to pass
20 the witness if you want to ask him any more.

21 MR. HANSEN: Very briefly.

22 EXAMINATION BY MR. HANSEN:

23 Q. We've been here a little over five hours, I
24 think, Mr. Dormire, so I just want to clarify --

25 A. Sure.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 154 of 331
Appellate Case: 14-1193 Page: 140 Date Filed: 01/28/2014 Entry ID: 4118269

Page 141

1 Q. -- a couple of things. Back -- right after we
2 started, a little after 1:30, you were asked a question
3 about a protocol that had been considered by the
4 Department and that is in Exhibit 1 and it's pages 2246 to
5 2249. And I'd ask you to look specifically at page 2248.
6 Do you have that yet?

7 A. 2248, yes.

8 Q. Actually, that's not the right page number. Oh,
9 yeah, it is. I'm at the wrong page number in my book
10 here. And I'll ask you to look down under paragraph b2A
11 and you were asked a question -- I'm going to paraphrase
12 it without having the court reporter go all the way back
13 and read it, but you were asked a question about whether
14 the Department maintained Midazolam and Hydromorphone for
15 use in executions. Do you remember being asked that
16 question?

17 A. Yes.

18 Q. And your answer was no, do you recall that?

19 A. Yes.

20 Q. Since you gave that answer, do you have any
21 information to include to correct that answer?

22 A. Yes; yes.

23 Q. And what is that?

24 A. I was reminded that we had purchased those items
25 as a backup. Yes.

Page 142

1 Q. **At the time this was --**

2 A. Being considered, yes, yes.

3 Q. **All right. And do you still -- do you still**
4 **have those drugs in your inventory?**

5 A. Yes.

6 Q. **Are those drugs part of the protocol that has**
7 **been adopted and is currently in use?**

8 A. No.

9 Q. **The only other question or topic I want to ask**
10 **you about is back about 3:30 or so, you were asked some**
11 **questions relating to M6 and M6 is the pseudonym for who**
12 **or what?**

13 A. It is -- on -- the contract is with the
14 pharmacy.

15 Q. **Okay. But that M6 refers to the pharmacy?**

16 A. Yes.

17 Q. **And you were --**

18 A. Well --

19 Q. **-- shown a document in response to**
20 **Miss Carlyle's -- or along with Miss Carlyle's question**
21 **which is found at page 12 of 60. And what is that**
22 **document?**

23 A. That is the naming of a pseudonym for team
24 member of M6.

25 Q. **That was the letter written to the pharmacy?**

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 156 of 331
Appellate Case: 14-1193 Page: 142 Date Filed: 01/28/2014 Entry ID: 4118269

1 A. Yes.

2 Q. **Informing them that that would be their moniker?**

3 A. Yes.

4 Q. **And what is the Department's position, does that**
5 **cover just an individual person or the pharmacy or what?**

6 A. We believe that covers the entire pharmacy.

7 Q. **Including its employees?**

8 A. Yes.

9 MR. HANSEN: Okay. That's all I have.

10 MS. CARLYLE: Okay. Well, unfortunately, it's
11 not going to be quite that simple.

12 MR. HANSEN: I'm just saying that's all I have.
13 If you have more questions, ask away.

14 MS. CARLYLE: Okay.

15 EXAMINATION BY MS. CARLYLE:

16 Q. **So when was it that you purchased Midazolam and**
17 **Hydromorphone for execution?**

18 A. I don't know the exact date.

19 Q. **Can you give me a year?**

20 A. Oh, it was in 2013. It was while this protocol
21 was being considered.

22 Q. **So it's still available, so if you wanted to**
23 **change the protocol next week, you would have it available**
24 **for an execution; is that true?**

25 A. Yes; yes.

1 Q. **Okay. How much Midazolam do you have on hand?**

2 A. I was told that it's enough for three
3 executions. I don't know how much that is.

4 Q. **Okay. And a similar quantity of Hydromorphone?**

5 A. Yes.

6 Q. **And can you give us the expiration date of the**
7 **Midazolam you have on hand?**

8 A. My understanding, it's later this spring, I
9 believe.

10 Q. **And similarly the expiration date of**
11 **Hydromorphone?**

12 A. I think it's about the same.

13 Q. **Okay. And where are the documents that reflect**
14 **those purchases? Well, who supplied the hydro -- the**
15 **Midazolam?**

16 A. Those would have been purchased by the business
17 manager at Bonne Terre.

18 Q. **Okay. From whom?**

19 MR. HANSEN: Hang on a second.

20 THE WITNESS: Yes.

21 MS. CARLYLE: There's nothing that says the
22 suppliers of Midazolam for a backup drug are members of an
23 execution team.

24 MR. HANSEN: Well, let me think about it.

25 MS. CARLYLE: Okay.

1 MR. HANSEN: Go ahead and answer.

2 A. Your question again?

3 Q. (By Ms. Carlyle) My question is who was the
4 supplier of the Midazolam?

5 A. Oh, I don't know.

6 Q. Okay. Who does?

7 A. The institution at Bonne Terre, the business
8 manager.

9 Q. Is that Miss Johnston?

10 A. Yes.

11 Q. Do you know who the Hydromorphone came from?

12 A. No. No, I don't.

13 Q. And would Miss Johnston know about that, too?

14 A. Yes.

15 Q. Okay. So when you were asked about this earlier
16 today, you simply forgot that you had them?

17 A. I was probably informed, but it -- I didn't
18 believe at the time that we had gone ahead and purchased
19 them, but I was reminded that we had.

20 Q. So who decided that the -- that Midazolam and
21 Hydromorphone should be purchased for executions?

22 A. Specifically, I don't -- I don't know. I would
23 assume that it -- that the final decision was Director
24 Lombardi.

25 Q. Was that something you recommended?

Page 146

1 A. I don't remember recommending it, no.

2 Q. Okay. **Was the decision -- well, I guess I'm**
3 **trying to get a little chronology here. Was the -- were**
4 **the Midazolam and Hydromorphone purchased before the**
5 **protocol we were talking about, 2246 through 2249, was**
6 **drafted?**

7 A. I do not know for sure.

8 Q. So you don't know whether -- let me think about
9 this for a minute. Does the Department of Corrections
10 plan to use Midazolam and Hydromorphone for executions?

11 A. At this point, no.

12 Q. Who knows what the exact expiration date is?

13 A. Miss Johnston.

14 Q. Do you believe that in order to use Midazolam
15 and Hydromorphone for executions, it would be necessary
16 for the DOC to release a new public protocol?

17 A. Yes.

18 Q. How soon before such an execution do you think
19 such a protocol would need to be released?

20 A. I don't know that answer.

21 Q. 24 hours?

22 A. No.

23 MR. HANSEN: Objection to the form of the
24 question, foundation. It's been answered, but go ahead.

25 A. Yeah, no, certainly not 24 hours, but I can't

1 tell you how long.

2 Q. (By Ms. Carlyle) Do you think -- are you -- do
3 you think it would be -- if you were to announce such a
4 protocol now, that it would be appropriate to use that
5 combination on Mr. Smulls on January 29?

6 A. It's awfully quick, but I don't make those final
7 decisions.

8 Q. Is that a decision Mr. Lombardi makes?

9 A. Yes; yes.

10 Q. Okay. Let me just ask you a couple of things
11 about this -- about M6. M6 you're now telling us is a
12 pseudonym for the pharmacy as a whole?

13 A. We signed a -- we signed an agreement with the
14 pharmacy that we would keep them confidential.

15 Q. Okay. Did you sign an agreement that you would
16 keep the individual employees confidential?

17 A. Not with each individual employee, no.

18 Q. Okay. How many individual employees at the
19 pharmacy have you dealt with?

20 A. Have I dealt with?

21 Q. Uh-huh.

22 A. Primarily one, but there is a second one that is
23 somewhat involved.

24 Q. And are you willing to reveal their names?

25 A. No.

1 **Q. Why not?**

2 A. I believe it would violate the agreement that we
3 have signed with them.

4 MS. CARLYLE: Okay. I think -- I don't think I
5 have any further questions.

6 MR. HANSEN: No questions.

7 THE WITNESS: Thank you.

8 MS. CARLYLE: Oh, signature.

9 MR. HANSEN: We'll waive presentment, like to
10 read it and sign.

11 MS. CARLYLE: Okay.

12 MR. HANSEN: 1 through 7, I want a copy of the
13 disk to show what it is, but not the disk itself. The
14 exhibits except 8 and 9, put the original with the
15 original deposition.

16 MS. CARLYLE: I just want an electronic copy and
17 PDF format.

18 MR. HANSEN: I just want an e-tran that will
19 have a copy of the exhibits.

20 (Proceedings concluded at 7:02 P.M.)

21

22

23

24

25

Page 149

1 CERTIFICATE OF REPORTER

2 I, Julie K. Kearns, Certified Court Reporter
3 (MO), Certified Shorthand Reporter (IL), Registered
4 Professional Reporter and Certified Realtime Reporter
5 within and for the State of Missouri, do hereby certify
6 that the witness whose testimony appears in the foregoing
7 deposition was duly sworn by me; the testimony of said
8 witness was taken by me to the best of my ability and
9 thereafter reduced to typewriting under my direction; that
10 I am neither counsel for, related to, nor employed by any
11 of the parties to the action in which this deposition was
12 taken, and further that I am not a relative or employee of
13 any attorney or counsel employed by the parties thereto,
14 nor financially or otherwise interested in the outcome of
15 the action.

16

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19 Julie K. Kearns, CCR #993, CSR, RPR, CRR
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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 163 of 331

Appellate Case: 14-1193 Page: 149 Date Filed: 01/28/2014 Entry ID: 4118269

1 Errata Sheet
2 Witness: DAVE DORMIRE
3 In Re: David Zink, et al. vs. George Lombardi, et al.
4 Upon reading the deposition and before subscribing
thereto, the deponent indicated the following changes
5 should be made:
6 Page Line Should read:
Reason assigned for change :
7
Page Line Should read:
Reason assigned for change :
9 Page Line Should read:
Reason assigned for change :
10
Page Line Should read:
Reason assigned for change :
12 Page Line Should read:
Reason assigned for change :
13
Page Line Should read:
Reason assigned for change :
15 Page Line Should read:
Reason assigned for change :
16
Page Line Should read:
Reason assigned for change :
18 Page Line Should read:
Reason assigned for change :
19
Page Line Should read:
Reason assigned for change :
21 Page Line Should read:
Reason assigned for change :
22
23 Witness Signature:
24 Reporter: Julie K. Kearns
25

Page 152

1 I, DAVE DORMIRE, do hereby certify:
2 That I have read the foregoing deposition;
3 That I have made such changes in form and/or
4 substance to the within deposition as might be necessary
5 to render the same true and correct;
6 That having made such changes thereon, I hereby
7 subscribe my name to the deposition.
8 I declare under penalty of perjury that the
9 foregoing is true and correct.

10
11 Executed the _____ day of _____, 20____,
12 at _____.
13
14 _____.

15 DAVE DORMIRE
16

17 My Commission Expires: _____

18 Notary Public: _____

19 JK
20

21

22

23

24

25

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 166 of 331

Appellate Case: 14-1193 Page: 152 Date Filed: 01/28/2014 Entry ID: 4118269

A	administration	138:4	announcement	93:2,3 132:1
ability 9:17	18:5 47:11 49:7	AG000639 8:17	83:25,25	138:4
12:12 149:8	55:15 97:11	AG002514 8:17	answer 10:22	appears 26:5
able 52:8,10	132:22 133:3	ahead 12:8 19:8	12:8,20,21,21	29:13 33:1 34:1
74:20	133:11	20:3,6 24:17	12:22 13:7,12	37:17,19 38:9
above-referenc...	administrative	40:3 53:21	13:13 23:16	57:20 58:1
150:11	20:10 29:7,24	60:18 87:3	30:7 40:11	66:11 67:17
Absolutely 25:19	30:1 32:21 34:8	90:13 123:7	42:24 43:4,11	71:16,18 73:24
accepted 124:15	50:4,5 53:25	138:20 145:1	43:22,25 45:1	74:7 79:22 82:3
account 13:19	83:6	145:18 146:24	45:19,22 52:8	82:20,22 92:14
132:16	adopted 142:7	al 1:4,7 3:4,7,18	53:21,23 55:8	92:15 116:8,25
accreditation	advance 43:6	3:19 150:8,8	60:3,18 61:9	123:1 134:1
74:4 116:16,19	127:14,16	151:3,3	63:2,10 64:18	136:21 149:6
116:20,25	advice 138:10	allegedly 44:8	97:1 98:11	application
117:13,14	advises 39:12	Allen 23:15,19	100:1 101:11	32:23
acknowledge 6:5	affidavit 2:13	27:9 39:12,16	101:16 102:2,3	apply 95:23
12:15 13:2	13:25 111:7,17	126:19	102:4,6 104:14	appreciate 49:25
24:20	111:24 112:20	alleviate 8:9	105:1 113:14	88:3 92:25
acknowledged	112:23,25	allow 43:22,22	113:16 114:6	approach 16:3
74:10	113:18,21	60:7 61:6 112:6	115:9 117:3,11	approached 55:4
acknowledging	afternoon 3:12	115:9	117:11 120:4	appropriate 63:6
44:20	AG 139:11	allowed 25:4	124:17 138:20	87:7 112:7,11
action 149:11,15	age 9:23	43:14 140:5	141:18,20,21	113:22 147:4
active 48:25 49:3	agencies 47:4	allows 89:11	145:1 146:20	appropriately
49:11	133:8	112:1 113:6,9	107:21	107:21
activity 39:14,15	ago 7:22,22 9:5	alternative 22:8	approval 89:14	
actual 16:19 37:7	AGO002250	ambiguous 41:20	approved 49:7	
56:15 99:20	20:13	41:23 100:1	49:12 88:16	
109:14	AGO002405	amended 2:11,12	area 95:1	
add 21:24	2:14 26:1	65:12,19 71:14	areas 27:20	
additional 11:2	AGO00247 2:14	American 116:15	argue 114:24	
12:11 92:14	AGO002471	116:19	Ashland 52:13	
109:11 112:15	26:6	amount 91:2	52:13	
address 72:18	AGO002587	109:14	asked 12:11 13:9	
86:2	2:15	amounts 131:16	23:14 40:20	
addressed 62:5,9	AGO002680	analyses 120:9	51:25 52:1	
73:24	2:15	120:24,24	60:14 86:14	
addresses 137:10	AGO2250 20:16	121:4	97:18 104:9,11	
140:1	agree 123:2	analysis 117:18	104:15 106:7	
adheres 47:19	agreed 5:1 25:11	119:17,21	131:22 141:2	
administer 77:16	54:3,4	120:2,6,16	141:11,13,15	
77:23 89:16	agreement 58:23	121:7,11,20	142:10 145:15	
administered	104:16 147:13	122:5,19	asking 10:17	
90:8,9,12	147:15 148:2	123:15,20	12:14 18:14	
administering	agreements	and/or 150:13	19:13 41:21	
77:22	58:16	152:3	51:8 52:3 53:7	
administers 90:6	AG's 137:15,21	announce 147:3	60:13 61:1,3	

63:2 72:16	139:18,22	66:12 134:12	118:3	49:16 54:1
76:17,18,19	149:13 150:5	batch 118:3	beyond 45:22	61:14,17 73:25
81:3 89:25	attorneys 140:6	123:19,21	107:21	74:18 83:13
115:4 131:3,10	attorney's 25:5	batches 108:9	bid 40:11 53:15	100:13,25
aspect 78:20,20	authority 28:18	109:10	55:15,24 56:8	101:5 104:14
asserted 101:14	39:18 108:25	Bates 2:14,15	56:11,17	107:2 113:20
114:7	authorization	26:23	124:10 126:21	117:11 124:9
assessment 15:6	50:8 51:3	Bates-stamped	bids 51:4,10,14	139:9,10,20
assigned 62:18	availability	9:13 25:17,20	51:15,16 101:3	bring 16:16
80:5 99:10	50:20	bear 72:22	big 26:4	building 17:6
151:6,8,9,11,12	available 7:6	Becky 136:1	bit 7:10 114:1	97:11
151:14,15,17	22:13 44:19	beginning 8:16	bits 107:15,17	bunch 102:24
151:18,20,21	46:2 54:14,21	46:15 82:1	blank 8:7 32:8,10	business 64:6,8
assignments	54:22 56:4	begins 19:7	70:20	64:11 74:1
80:21 81:4	143:22,23	26:23 71:6	blanks 31:3	114:1 115:12
assistant 20:10	awaiting 140:4	78:25 79:1,11	blocked 35:7	115:15 116:15
29:7,24 30:2	aware 12:24,24	79:13 80:19,19	bolded 94:16	144:16 145:7
32:21 34:8	15:10 67:8 71:9	behalf 1:10 9:24	Bonne 110:18,22	businesses 114:2
53:25 83:6	74:18 82:25	10:10	144:17 145:7	buying 41:3
Association	83:6 91:24	belief 117:16	book 141:9	b2A 141:10
116:15,19	96:12 97:17	122:14 123:24	Boresi 4:9 6:21	<hr/> C
assume 51:14	98:16,19 118:9	7:22 16:9 27:1	9:10 86:8 95:7	C 4:1
72:18 103:12	120:7	33:15 34:12	127:6,13	call 27:17 36:10
117:9 119:19	awfully 147:6	36:8 42:7 48:3	136:19	36:10,11 39:4
145:23	<hr/> B	49:16 50:10	bottle 38:24	68:2 80:15
assumed 107:7	B 19:7,16	55:22 58:4,18	bottles 110:12	88:12 99:17
assuming 30:9	back 6:9 17:15	63:6 65:4,20,21	bottom 23:13	134:4,6 140:17
33:3 89:19	20:23 34:18	70:12 74:4	65:15 81:16,17	called 36:9 55:14
assumption	68:14 76:22	75:21 82:12	111:8 119:20	91:2 125:15
110:20	83:15 88:1,2,24	83:13 89:4	123:12,25	calling 60:3
attach 16:20	94:1 95:10	90:24 99:3	132:18,19	calls 12:19 50:25
attached 2:18	108:7 129:1,9	100:3,8 107:5	Boulevard 4:14	67:7 104:25
65:14 124:11	134:14 138:17	112:17,25	box 110:10	122:23
attaching 38:14	141:1,12	113:20 122:7	brand 39:1	capable 57:10
attempt 56:18	142:10	122:10 123:17	break 17:12,14	capital 134:23
97:5	backup 22:12	124:21 132:15	40:10 51:19,23	capitals 37:8,10
attempted 13:17	141:25 144:22	135:7 140:19	51:25 52:6	car 16:16
67:8	badly 32:19	143:6 144:9	108:3	cards 68:1,16,24
attempts 11:3	bag 78:8,9	145:18 146:14	brief 66:5 94:22	careful 42:18
55:25 65:4	base 112:2	148:2	briefing 94:12,22	43:14,24
attend 33:12	based 6:23 30:22	believes 89:12	briefly 65:24	Carlyle 2:2,4 4:4
attending 34:2	34:9 36:21	believing 133:3	140:21	4:4 5:10,18,21
attention 19:6	89:12 122:25	best 12:12 16:3	Briesacher 15:11	6:3,6,13,16
23:13 39:5 72:7	basic 10:6	41:24 149:8	16:7 20:10 22:4	7:15 8:3,24
150:17	basically 7:15	better 16:19	42:1 46:13,16	9:15,21 10:1
attorney 4:9 9:7	32:8 57:25	22:12 37:20,21	47:8 48:3 49:14	11:16,20,23

12:3,4,8 13:3	93:1,4,14,17,19	128:23,24	changes 12:17	32:6 43:6 49:14
14:9,11,19,23	94:5,8,18,21	129:9 131:22	34:13,15,20	49:21 59:1
15:1,3 16:13,22	95:5,8,10,11	categories 53:6	150:13 151:4	85:25 87:1
17:2,10,13,15	97:20 100:4,10	61:4	152:3,6	112:16 130:15
17:22,24 18:16	101:17,18	category 52:21	changing 30:22	139:10
18:18 20:2,4,8	102:2,9,19	70:9,10 72:17	34:8	cleared 84:3
20:16 23:3,7,10	103:6,9,11	75:24 95:20	characterize	clearer 16:19
23:12,24 24:4,8	105:5 108:1,4,7	96:4	23:21	38:6 112:19
24:11,14,15,19	108:8 111:1,6	cause 3:16	chase 59:11	clearly 106:22
24:23 25:12,19	111:13,15,16	cautiously 44:2	check 84:6 128:1	clergy 140:6
25:22,23 26:20	113:17 114:8	CC 150:21	137:16,22	clerk 62:16
27:14 30:8,12	114:16,20	CCR 1:12 149:19	138:4 139:8,19	client 118:20
30:16 32:11,14	115:8,11,24	CD 2:9,10 5:12	checked 31:4	122:11,17
32:15 33:20	116:2,12,14	17:18	checklist 30:11	123:2
34:13,24,25	117:13 120:12	cell 39:17 79:20	30:21 31:4	close 8:21
37:9 39:4,9,21	120:14,23	81:21 82:2,3,9	checks 138:24	code 83:20,22,24
40:5,22 41:24	121:3,4,24,25	82:11,13,17,19	139:17,21	83:25 84:1,2,5
42:22 43:1,8,16	122:19,24	Center 28:15,17	check-off 31:6	collection 120:15
43:20 44:3,6,10	123:6,8 124:6,8	134:22	chemical 21:1	collects 127:1
44:13,17,22,23	124:22 125:2,4	centered 94:16	30:18 38:15,17	column 91:2
45:4,10,18,24	126:15,17	central 1:2 3:2	87:18,20 88:11	combination
46:5,6 47:25	127:4,9,15,17	28:25 31:14	134:22	147:5
48:22 49:24	129:12,14,17	32:18 33:15	chemicals 18:5	come 33:15 49:1
50:1 51:2,18,22	129:20 130:2	35:12,13 36:2	49:4,11 101:1	
51:24 52:5,7	130:12,16,22	36:20,22 37:1,4	103:6	
53:24 57:4,6	130:24 131:3,8	111:19	comes 29:6	
59:4,6 60:5,11	133:6,9,12	certain 3:16	110:14	
60:14,20 61:2	134:18,20	certainly 14:19	coming 139:24	
61:10 62:14,22	135:18,19	58:21 76:5	Commission	
62:25 63:8,12	136:18,20,21	90:24 102:4	152:17	
63:18 64:19,24	137:21 138:1	146:25	commissioner	
65:6,9,14,18	138:13,19,25	certificate 64:4	132:21 133:10	
66:2,6,9,10	139:6,15	121:20 149:1	communicate	
67:10 68:10,12	140:19 143:10	certification 64:2	99:8	
68:14,15 69:4	143:14,15	116:9,9	communicated	
70:10,24 71:4,5	144:21,25	Certified 3:15	47:19 113:15	
71:21 73:18,21	145:3 147:2	5:4 149:2,3,4	communication	
74:17,20,25	148:4,8,11,16	certify 149:5	106:3	
75:13 76:19,22	150:16,21	152:1	company 62:15	
79:7,9 81:2,14	Carlyle's 142:20	chain 109:19	complaint 2:11	
81:17 84:13,16	142:20	change 13:12	2:12 65:12,13	
84:21,25 85:4	carried 110:7	51:7 99:14	65:14,20 71:14	
85:24 86:1,10	carry 110:10	143:23 151:6,8	complaints 61:12	
86:23 87:2,9	case 8:1 65:20	151:9,11,12,14	complete 87:19	
88:2,5,8,22,24	67:5 117:1	151:15,17,18	completed 37:3	
88:25 91:21	150:11	151:20,21	82:1	
92:6,8,9,21	cash 128:2,3,7,18	changed 13:4	comply 41:1	

compound 80:24 87:4 107:8	confirms 70:14 106:23	104:19 105:3 contractor's 58:9	136:13,23 139:12 141:21	CP 81:21
compounded 48:1,5,13 49:1 72:2 105:9 108:20 119:17 121:7,11 122:6	confused 8:25 9:4	contracts 59:16 control 90:4 108:13 134:22	152:5,9 Correctional 28:14,16	criteria 89:15,17 112:15 crossed 118:24 119:1,3
compounding 21:5 42:11 47:14 48:1,11 48:11,17,18 106:17	confusing 80:24 104:25	confusion 111:22 112:18	corrections 3:14 6:25 7:11,16 8:11 9:12 15:8	CRR 149:19 CSR 149:19
compounds 42:15 68:20	connected 78:9 114:2	connection 115:2 115:12,15	18:5 22:12 37:14 39:11,19 39:25 41:6 42:9	Cummins 98:24 99:1
comptroller 131:2	conservative 107:20	conservative 98:6	46:8,17,21 47:6 48:2 49:10,15 50:7 61:11	current 18:11 19:4 69:9,11
computer 103:8 103:10 130:17	considered 141:3 142:2 143:21	considered 141:3 142:2 143:21	100:12 104:17 105:10 115:21	currently 15:12 18:14,19 22:9 142:7
concentration 135:6	construed 119:21	construed 119:21	129:7 132:24	custody 109:19
concern 7:23 62:6	consult 113:17	consult 113:17	133:13 146:9	cut 94:9,10
concerns 8:9 15:3	consulted 36:3 83:13 132:13	consulted 36:3 83:13 132:13	150:13	D
concluded 148:20	consulting 113:20 132:12	consulting 14:19,20 17:5 22:22 23:9	correctly 80:18 90:18 138:5	DAI 94:12
conclusion 12:19 25:10 67:7 105:1	contact 41:7,18 42:9 55:25 56:12 97:18	contact 41:7,18 38:9,12 55:13 58:2,19 65:10 65:25 66:3	129:7 132:24 133:13 146:9 150:13	date 20:7 22:1
condition 112:1 113:5,9	contacted 39:23 40:4 97:19 99:14	contacted 39:23 40:4 97:19 99:14	129:7 132:24 133:13 146:9 150:13	57:14,20 64:24
conduct 47:2	contain 66:12	contain 66:12	correct 2:19 5:2 5:2 49:16 67:4	65:21 66:16,18
conducted 7:25	contained 17:18	contained 17:18	74:14 96:18 149:10,13	66:20,22,23
conducting 117:18 134:8	containers 110:8	containers 110:8	counselor 98:24 counselor 98:24	67:22 69:5,18
confident 17:17	containing 5:13 6:17,22 129:24	containing 5:13 6:17,22 129:24	couple 9:5 136:14 141:1	72:22 73:2,3,3
confidential 7:18 24:22 39:9 44:20 55:22,23 57:11 125:16 140:5,9,9 147:14,16	contains 5:17 63:21 67:15	contains 5:17 63:21 67:15	couple 9:5 136:14 141:1 147:10	73:4,5,6 75:20
confirm 32:25 33:9 57:2 64:22 87:16	contend 12:1 72:1 137:12	contend 12:1 72:1 137:12	course 16:4 27:9 31:1 114:23	81:24 101:19
confirmed 70:19 110:21	context 122:16	context 122:16	court 1:1 3:1,15 3:17 4:12 5:4	102:8 103:1
	continue 20:11	continue 20:11	67:3 111:9 114:8 141:12 149:2	106:23 107:6,9
	contract 46:12 59:1,7 105:6	contract 46:12 59:1,7 105:6	Court's 6:23 96:19 99:20	108:14 116:8
	115:19,20	115:19,20	106:1,18 110:1	119:11,11
	131:13,14,17	131:13,14,17	110:2,4,5,19	121:21,21,25
	131:18 142:13	131:18 142:13	121:12 124:2	143:18 144:6
	contracting 58:9	contracting 58:9	125:13 126:23	144:10 146:12
	contractor	contractor	135:13,14,16	150:16
				dated 57:14 58:7 58:7,8,21 81:20
				dates 13:5,6 58:6 66:7 67:9 74:18
				76:21 81:7
				119:18
				Dave 1:10 2:13 3:10 9:22 27:11
				38:23 111:7
				150:11 151:2
				152:1,15
				David 1:4 3:4,18

4:8 33:7 150:5 150:8 151:3 day 3:11,13 13:13 31:12 46:16 74:16 98:4 107:22 152:11 days 7:22,22 9:5 81:8 106:17,24 107:9,14 DEA 58:10,12 140:2 dealing 139:1 deals 19:17 dealt 147:19,20 Dear 150:9 death 87:16 103:16 Debbie 32:21 debriefing 94:19 94:21 December 6:21 6:21,23 7:12 8:12 9:20 44:8 65:20 66:19 67:11 69:17 71:15 111:8 decided 16:8 21:24 35:21 100:4 134:6 145:20 deciding 89:15 decision 16:10 22:3,4,18 69:21 115:6 128:24 145:23 146:2 147:8 decisions 147:7 declare 152:8 declared 85:22 declined 46:3 Defendant 3:20 5:2 14:7 defendants 1:8 3:8 4:7 5:13 defined 14:12,13 14:13	definition 14:14 15:4 degree 45:1 100:2 105:2 deleted 9:8 delivered 41:15 49:4 110:21 deny 64:22 department 3:13 6:24 7:11,16 8:11 9:12 15:8 16:1,4,9 18:4,8 18:11 19:1,10 19:20,23 22:9 22:11 37:11,13 39:11,19,25 41:6 42:8 46:7 46:7,17,21 47:6 48:2 49:9,15 50:7 61:11 100:11 104:17 104:20 105:4 105:10 115:21 125:18 129:6 132:23 133:13 136:11 141:4 141:14 146:9 Department's 143:4 deponent 151:4 deposes 9:24 depositing 46:16 deposition 1:10 3:10 5:3,8 8:21 10:5 16:21,24 24:21 25:10 43:6 44:11 46:2 74:10 148:15 149:7,11 150:10 151:4 152:2,4,7 deputy 76:6 97:16,23,24,25 98:1 describe 21:11 21:14,17 63:24 64:1 70:9,10	97:13 described 27:15 29:15 115:7 describes 21:8,9 describing 14:2 50:19 designation 21:25 62:18 designee 39:12 39:20 desired 150:14 destroy 7:14,15 destroyed 7:12 9:2,4,7,8 91:6 105:22 135:12 detail 14:2 107:15,16 details 27:18 determination 16:6 140:6,7,12 140:13 determinations 16:5 determine 25:10 46:8 54:10,14 85:5 87:7 100:12 112:7 112:10 116:18 determined 8:4 16:1 determines 19:10 determining 140:4 developing 14:3 15:13 development 15:7 Diagnostic 28:14 28:16 134:22 difference 48:4,6 92:12 differences 57:9 57:18 different 8:5,8 24:10 51:5 57:20,22 58:16 58:16,16,21,21	58:22,23,24 59:7 68:16 80:3 80:16,21,21,22 80:25 81:3,4,4 81:5,6,7 95:25 114:1 direct 11:1 42:22 42:23 45:22 53:23 102:2,3,5 directed 7:13 103:21 106:12 139:16 directing 45:18 direction 112:19 149:9 directions 33:11 directly 10:8 46:3 49:17 director 16:9 19:10 22:5 29:6 29:10 32:20,24 36:10 39:11,19 49:17 88:18 94:12 108:25 133:2 145:23 director's 33:24 89:13 directs 89:10 disbursed 125:24 discard 106:22 107:6 discarded 78:1,8 87:21 91:2 disclose 42:20,20 disclosing 43:18 disclosure 44:7,8 discovery 2:9,10 5:13 6:20,22 9:1,3 25:5 49:23 61:20 67:5 69:18,19 101:24,25 120:15 discretion 104:22 discuss 115:5 discussion 113:19	disk 5:22,25 6:1 6:2,10,17,19,22 6:24 7:2,5,5,6 7:20 8:20,22,22 9:16 16:25 49:23 52:25 61:20 129:24 130:17 148:13 148:13 disposal 87:17 dispute 6:1 distributor 21:4 DISTRICT 1:1,1 3:1,1 division 1:2 3:2 35:19 37:11,12 DOC 117:23 118:5 123:23 146:16 doctor 67:22 89:11,13,13 100:14 document 16:20 18:2,7,10 19:7 20:5,18,25 32:17 53:3,14 57:7 58:19 65:1 65:1,22 67:3 71:10,13 73:1 116:7 117:5,8 119:10,16,20 121:10 122:25 124:18 128:22 134:2 136:22 142:19,22 documents 6:17 6:22 7:4,10,17 7:20 8:6,10,18 8:19 9:19 17:16 20:12 23:17,21 23:24 25:3 27:23,25,25 28:4,25 40:5 52:1,8,24,24,25 55:6 57:15,24 63:21 66:12 67:15 68:5
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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 171 of 331
Appellate Case: 14-1193 Page: 157 Date Filed: 01/28/2014 Entry ID: 4118269

69:14 72:9 79:2 84:18,19 85:1 91:21 92:13 125:15 127:8 127:10 129:24 132:14 137:5 144:13 doing 22:17 44:21 57:10 78:22 83:10 85:9 115:14 120:9 129:23 133:19 domain 55:7 Dormire 1:10 2:13 3:10 5:11 9:22 10:2 17:16 17:19 22:21 23:8 25:16 52:1 52:7 71:13 111:7 140:24 150:11 151:2 152:1,15 Dormire's 14:8 44:11 DORS 37:7,8 double-sided 26:1,2,3,4,6,18 Doug 132:19,20 132:21 downstairs 126:3 draft 10:10,12,13 10:13,14,16,19 drafted 10:18 146:6 drafting 10:17 draw 19:6 23:12 72:7 Drive 3:14 drug 24:10 40:17 47:11,14 49:7 134:24 144:22 drugs 41:9,12 42:14 44:23 45:20 60:1,7,16 60:22 61:6 77:17,22 115:1	117:23,25 118:1,4,8,11 142:4,6 duly 149:7 duplicates 8:6 duties 82:8 D-O-R-S 37:8,9 <hr/> E E 4:1,1 earlier 8:2 27:14 101:11 134:2 145:15 easier 16:24 93:15 127:16 Eastern 28:13,14 134:21 easy 120:17 ECF 111:7 educational 68:23 effect 18:15,19 21:20 75:15 effort 49:10 eight 65:19 either 14:6 40:24 53:25 59:24 60:6,15,20 66:3 87:18,19 94:7 137:12 evaluate 87:15 evening 3:13 108:19 event 17:4 99:18 everybody 15:13 17:2 evidence 116:4 exact 22:1 40:25 73:2 79:24 143:18 146:12 exactly 12:23 36:13,14,24 44:12 60:25 employees 143:7 113:14 119:2 121:10 135:10 EXAMINATI... 9:25 140:22 143:15	ends 24:25 34:9 engage 42:12 ensure 7:17 27:19 54:11 137:5 ensuring 107:18 entire 6:1 143:6 entirely 121:2 entities 15:6 21:22 58:17 115:15 entitled 67:4 114:25 121:20 entity 16:5 62:4 entry 39:6 83:20 equipment 30:11 ERDCC 28:12 21:25 23:15 26:13 28:1 errata 150:12,14 150:15 151:1 escorted 39:13 Esq 4:4,8,8,9 150:5,21 effort 49:10 eight 65:19 either 14:6 40:24 53:25 59:24 60:6,15,20 66:3 87:18,19 94:7 137:12 evaluate 87:15 evening 3:13 108:19 event 17:4 99:18 everybody 15:13 17:2 evidence 116:4 exact 22:1 40:25 73:2 79:24 143:18 146:12 exactly 12:23 36:13,14,24 44:12 60:25 employees 143:7 113:14 119:2 121:10 135:10 EXAMINATI... 9:25 140:22 143:15	examine 102:14 102:21 examined 3:11 9:23 example 13:5 86:2 121:9 examples 134:12 executed 72:24 91:25 96:7 99:2 99:22,23 104:21 152:11 execution 13:25 18:14,18 19:3 entity 16:5 62:4 entry 39:6 83:20 equipment 30:11 ERDCC 28:12 21:25 23:15 26:13 28:1 errata 150:12,14 150:15 151:1 escorted 39:13 Esq 4:4,8,8,9 150:5,21 effort 49:10 eight 65:19 either 14:6 40:24 53:25 59:24 60:6,15,20 66:3 87:18,19 94:7 137:12 evaluate 87:15 evening 3:13 108:19 event 17:4 99:18 everybody 15:13 17:2 evidence 116:4 exact 22:1 40:25 73:2 79:24 143:18 146:12 exactly 12:23 36:13,14,24 44:12 60:25 employees 143:7 113:14 119:2 121:10 135:10 EXAMINATI... 9:25 140:22 143:15	executions 13:7 13:10 23:18 27:16 31:17 33:12 34:16 36:1 109:5,7 141:15 144:3 145:21 146:10 146:15 exhibit 2:11,12 5:12 6:5,7,16 7:7,21,25 8:15 8:23 14:24 16:15,16,20 17:18 25:8,11 25:13,18,24 26:21,23,24 31:22 32:16 38:22 49:23 50:1 53:1 61:20 65:6,8,13,19 66:11,15 70:25 71:1,14 86:22 88:1,2 111:3,25 129:23 130:11 130:13,21 141:4 exhibits 2:6,17 2:18 24:17 148:14,19 exist 27:23 57:25 exists 11:24 36:4 expect 46:23 expert 105:1 expiration 64:24 66:15 69:18 99:19 119:11 121:21,25 144:6,10 146:12 expire 67:22 69:5 101:19 expired 67:11 expires 106:17 152:17 explain 48:4,9 50:18 61:2 79:14
---	--	---	--	--

explained 8:1,2 107:13	111:20	135:25 136:1 137:20	forms 38:15 80:15 134:7	G
explore 22:16	fetch 52:1	fiscal 50:4,5 131:2 132:4,8	form's 35:25	Gary 50:3,5
export 60:1,7,16 60:22	figure 58:15 95:2 97:21	five 16:2 23:13 86:13 90:18,19	forth 31:16 77:19 79:17	general 48:10
expressed 119:21	file 80:20	104:4,5 112:10	found 142:21	generally 10:15 10:15,19 42:6
expressing 7:23	filed 10:9 61:12 65:20 67:3	135:12,12 140:23	foundation 12:7 40:19 45:1 47:22 48:20	42:12,15 63:24 104:3 107:7 140:7
expressly 5:6	71:15 111:7,9	five-minute 108:2	50:25 53:20 60:24 61:8	Generals 139:17 139:18
extent 46:14	files 9:8	fixed 129:18	62:13,20,24	General's 4:9 9:8 138:23 139:22
extra 126:24	filings 65:21 150:16	floor 23:2,4	69:1 100:7	150:5
extraterritorial 59:25 60:15,21	fill 36:20 55:18 55:20 80:14	follow 70:19 71:6	102:17 113:13 137:18 146:24	George 1:7 3:7 3:19 150:8 151:3
eyes 25:5 95:2	filled 35:18 55:16 80:25 81:2	following 37:18 78:22 151:4	four 11:6 14:14 15:5 81:8 93:7	getting 51:16 118:7,8
e-mail 8:1 70:2,4 70:12,22 71:16 71:23	filling 31:2 55:21 80:7	Food 47:11 49:7	131:14,17,18 135:3 136:10	give 14:6,20 16:19 21:8 26:7
e-tran 148:18	fills 36:24 134:7	foregoing 149:6 152:2,9	fourth 22:23 96:17,24	44:14 52:2
F	final 16:10 25:20 145:23 147:6	forget 76:15	Franklin 23:15 23:19 26:11,13	53:23 70:7 85:8
facilities 49:6,12	finally 10:2	forgetting 88:3	99:16 101:19	99:16 101:19
facility 47:15	finance 126:3 128:17	Forgive 130:25	104:22 108:25	104:22 108:25
fact 5:22 7:19 18:7,10 41:22 44:1 57:6 91:4 99:4 101:11 114:24,25 124:13 130:10 134:9	financially 149:14	forgot 145:16	112:14,18 120:3 130:18 131:22 139:3,4 143:19 144:6	112:14,18 120:3 130:18 131:22 139:3,4 143:19 144:6
facts 101:24	find 10:23 11:22 14:6 24:14 49:10 50:21	form 12:6,19 30:17 33:1 35:9 35:11,16,22	fourth 22:23 96:17,24	given 23:17 25:7 29:12 55:10
fair 7:7 19:14,16 25:12,12 90:19 103:16 115:11	116:24 124:11 150:10	36:19,25 37:19 38:16,17 40:18	Franklin 23:15 23:19 26:11,13	57:9 89:23,25
falls 61:3	finding 29:5	41:19 44:25	99:4 126:10	90:1 114:25
familiar 44:7 116:14 132:2	fine 34:19 51:20 60:10 103:10	47:21 48:19	Franklin's 96:12 99:4 126:10	120:15
families 96:1	firm 29:24	50:24 53:19	frequently 55:18	glanced 69:2
family 91:25	first 11:6 13:18	55:15,16,18	friends 96:6	go 9:17 10:8 12:8
far 44:2 80:12 93:2,3	13:21,23 18:1,3	60:23 61:7	front 34:14 56:24	17:6,12,13 19:8
fax 58:19 140:2	18:17 20:14	62:12,19,23	73:1 89:21	20:3,6 23:10
faxed 58:2,3,4	25:17,25 30:20	67:6 68:25	101:20	24:17 26:18
February 74:13 74:17 75:11	35:21 38:3 39:8	79:23 80:2,9,23	fulfill 46:12 105:6	29:2 30:9 34:18
federal 47:11 133:4	41:9 42:9 50:2	87:19 99:25	function 54:19 62:17 131:19	39:22 40:3
fee 127:1	55:12 64:1 75:4	100:7 102:16	139:2	53:21 60:18
feel 54:13 84:18	75:10 79:19	104:24 113:12	fund 133:20,22	83:15 85:5 87:3
	84:13 89:17	120:10 122:21	further 9:3 12:16	94:1 95:5 108:4
	91:12 92:4	123:4 137:18	116:5 148:5	111:14 114:11
	102:10 106:2	146:23 152:3	149:12	115:24 123:7
	118:19 135:21	formal 22:14		124:22 129:9
		format 29:7		134:14 138:20
		57:21 148:17		
		formatted 29:11		
		33:5		

141:12 145:1	granted 39:18	Hansen 2:3 4:8	100:6 101:9,21	helping 29:24
146:24	great 25:22	5:16,19,24 6:4	102:3,16 103:5	High 4:10 150:6
going 5:19 8:5,22	107:15,16	6:9,15 7:8,9,16	103:7 104:24	history 35:11
11:12 12:18	group 95:25	9:6,11,16 11:12	107:24 108:2	Hofmeister
14:15,25 15:1	GSA 133:4	11:19,21,24	111:4,12,14	135:21,25
17:2,3,3,8	guess 8:24 12:25	12:6,18 14:5,10	113:12 114:3,9	Hold 40:1
20:23 22:21	17:5 18:2,16	14:15,22,24	114:13,18	holding 39:17
25:11 30:5	24:15,16 35:20	16:18,23 17:8	115:5,9 116:11	79:20 81:21
37:24 39:22	35:20 36:12	17:11,21 18:13	117:6,10	82:2,3,9,11,13
41:19,22 42:17	38:6 51:7,21,24	20:1,6,14 23:1	120:10,13,21	82:17,19
43:2,8 44:10,14	55:3,25 58:14	23:5,9 24:1,6,9	121:1,23	hopefully 8:21
44:25 45:7,22	70:18 75:2 80:3	24:12,18,20	122:18,21	hoping 7:6
51:21 57:1 60:2	81:3,9 82:17	25:1,15,20	123:4,7 124:5,7	hospital 50:21
63:2 64:15	83:3 84:16 85:4	26:15,17 27:11	124:24 126:14	hour 51:21 100:3
65:23,25 66:3,4	91:12 109:10	30:6,14 32:6,12	129:11,16	hours 3:12
66:6 68:25 70:7	110:20 116:24	33:17 34:11,23	130:1,3,5,7,14	140:23 146:21
80:23 84:7	120:19 122:1	37:8 38:23 39:1	146:25	146:25
87:25 88:2,5	126:9 128:24	39:7,10 40:1,3	Huh 94:5	
93:23 96:10	135:8,10 136:9	40:18 41:19	hydro 144:14	
100:6 101:9,21	146:2	42:17,25 43:5	Hydromorphone	
101:25 102:5	guidelines 140:8	43:13,17,21	19:18,24	
106:8,11	gurney 77:12	44:5,9,12,16,18	141:14 143:17	
107:25 112:3	<hr/> H	44:25 45:7,15	144:4,11	
114:3,14 118:4	half 51:21 75:21	45:21,25 47:21	145:11,21	
118:21 120:10	halt 39:16	48:19 49:21	146:4,10,15	
127:6,10 129:1	hand 22:21,22	50:24 51:20,23	<hr/> I	
132:15 137:17	24:4 71:2	52:4 53:19 57:3	idea 6:18 25:22	
138:9 139:3	105:11 144:1,7	59:3 60:2,9,12	42:14 55:4 71:6	
141:11 143:11	handed 6:22,25	60:18,23 61:7	75:19 91:1 92:2	
good 18:17 38:25	66:11	62:12,19,23,25	137:16	
39:3 47:19	handing 71:13	63:6,9,13 64:15	identical 48:13	
51:23 83:23	86:12 129:23	64:23 65:11,17	identification 6:7	
106:24 107:25	handwriting	65:23 66:3,8	25:14 65:8 71:1	
goodness 6:18	58:22 136:24	67:6 68:11,25	111:3 130:21	
goose 59:11	137:2 138:5	70:9 71:2,19	identified 7:20	
government	handwritten	73:17,19 74:16	8:6,16 23:18	
68:23 69:3	136:21	74:23 75:12	29:12 49:23	
133:5	handy 65:25	76:17 79:6	65:12 91:23,23	
governmental	117:7	80:23 81:13,16	identifies 81:24	
47:4	hand-carried	84:7,15,20,22	125:21	
grab 88:9	110:17	85:3,11,20,25	identify 14:1	
grams 16:2 90:18	hang 20:1 57:13	86:21,25 87:3	25:17 26:10	
90:19 104:4,5	79:10 86:21	87:25 88:4,20	54:18 60:7 65:5	
104:12,13	92:24 94:6	91:18 92:4,7,19	67:9 81:23	
105:12 109:10	101:9 136:16	92:23 93:13,15	86:22 101:12	
109:16 135:12	144:19	94:4,15 95:4	103:12 114:7	
135:12		97:13 99:25		

118:10 130:10 139:2 identifying 54:17 54:24 identities 125:18 identity 42:21 43:19 45:8 60:4 64:17 76:18 83:3 85:1 101:14,23,25 106:13 IL 149:3 implied 119:22 implying 51:9,11 inaccurate 63:10 inadvertent 44:8 inadvertently 42:20 include 20:25 27:17 66:20 141:21 included 66:25 95:22 includes 21:21 95:20 Including 143:7 INDEX 2:6 indicate 66:15 98:22 150:13 indicated 105:23 114:4 139:21 151:4 indicates 40:12 indicating 32:24 62:2 87:20 137:23 138:21 individual 32:24 62:4,5,7,9,10 62:11,17 143:5 147:16,17,18 individuals 29:12 48:16 54:17,25 83:1 138:24,25 139:1 industry 47:20 informal 22:15 information 7:18	10:7 11:2 12:17 12:17 13:19 17:17 27:18 33:2,5,6,7 36:21 38:1 44:14 45:15 53:6 54:12,14 54:20,25 55:9 55:23 57:25 64:16 66:24 69:21,25 72:15 72:17 75:5,7,10 81:5 93:9 97:19 101:12,22 114:9 116:6 118:24 119:7 139:18 141:21 informed 41:3 145:17 informing 32:22 143:2 ingredients 48:25 49:3,11 injected 90:9 injection 14:2,11 15:4,7,13 18:6 inquiry 7:25 61:11 insert 112:3 inserted 112:2 113:10 inserting 112:4 114:15 inspect 46:17,21 inspected 46:22 47:11 instance 63:11 instances 63:13 institution 27:19 28:9,10,11 33:16,23 34:4 68:23 96:13 97:7,8 110:24 145:7 instruct 64:17 instructing 101:15	instruction 64:23 intend 113:21 114:10 intended 112:14 123:23 intent 69:24 112:16 intention 43:21 interested 149:14 interesting 96:10 127:11 internal 128:22 129:3 interpreted 24:7 interrogatories 10:11,20,24 11:7,9,18 12:15 12:22 13:20,24 14:8,12 22:23 75:4,10 86:11 86:24 96:17,21 97:1 interrogatory 10:9 11:5,14,14 11:22,24 12:5 14:16 15:9 30:7 74:13 86:13 98:14 105:23 interval 99:19 intravenous 19:9 77:19 87:8 112:11 113:23 introduction 87:8 inventory 134:21 142:4 investigation 47:3,5 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12	147:23 involvement 29:23 31:2 34:8 98:8 issue 43:24 89:11 104:13,23 111:18 127:11 issued 13:25 68:23 104:1 issues 43:17 129:7 item 119:7 136:2 items 141:24 iteration 64:25 IV 39:17	151:24 July 5:14,15 6:11 June 121:22
K				
				K
				K 1:12 3:15 4:13 5:3 149:2,19 150:20 151:24 Kansas 4:5 Kearns 1:12 3:15 4:13 5:4 149:2 149:19 150:20 151:24 keep 55:22,23 88:3 147:14,16 kind 42:11 43:23 58:14 62:10 75:22 79:1 85:5 116:3 kinds 120:16 knew 69:23 83:10 114:17 114:17 129:21 know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17 15:19,23 22:5 28:11 30:10,19 30:21 31:14 32:18 48:17 51:16 87:16 140:3,12
				know 5:19 10:5 11:8,10 12:23 18:22,24 19:2,4 JK 152:19 job 28:3 36:11,14 37:5 55:20 62:10 87:9 97:14 98:4 101:3 126:4 jobs 76:1 Joe 5:14 135:21 135:25 Johnston 135:23 136:1 145:9,13 146:13 Joseph 23:15,19 26:13 72:24 invoice 74:6 involved 14:1 15:6,12,16,17<br

74:19,25 75:20	146:12	leave 36:18 leaving 99:13 led 59:11 101:24 ledger 132:1 left 96:13 97:17 99:9 left-hand 119:14 legal 12:19 39:14 39:15 67:7 105:1 138:10 140:14 length 107:14 Lenny 131:1,6 lethal 14:1,11 15:3,7,13 18:6 letter 7:23 29:6 29:10,11,12,13 29:18 32:20,22 32:23 33:9 73:24 74:2 124:8 142:25 let's 15:25 17:11 22:21 24:17 25:23 30:8 lack 12:7 40:19 45:1 47:22 48:20 50:25 53:20,20 60:24 61:8 lacks 62:13,20,24 69:1 100:7 102:17 113:13 language 103:19 103:23 Larkins 15:17,19 15:19 lasts 107:13 late 6:19 law 4:4 47:14,16 71:10 lawful 9:23 lawyer 114:11 lead 42:19 64:16 101:12,22 leads 63:10 learned 135:11	102:7 licensed 49:11 59:24 60:1,5,6 60:9,14,16,19 60:20,21 61:5 64:14,21 101:8 licenses 47:3 138:22 licensing 66:22 66:23 light 121:17 likelihood 46:11 line 39:17 71:6 78:10 111:19 111:19 112:8 151:6,7,9,10,12 151:13,15,16 151:18,19,21 lines 19:9 77:19 87:8 112:1,2,5 112:11 113:5,9 113:10,23 Linger 131:10 list 6:17 33:23 38:10,13 74:14 74:21,23 84:5 92:15,16,16,17 listed 6:16 20:25 31:6 56:1 118:20 listen 43:24 137:25 lists 20:23 litigation 4:13 43:7 150:1 little 7:10 8:25 9:4 27:1,4 29:5 129:21,22 134:16,21 139:24 level 97:16 Lewis 98:3 Lewis's 98:4 license 58:12 60:19 64:25 66:16,21 67:10 67:12 101:19	110:10 log 30:18 38:15 38:17 78:25 79:11,13 80:8 80:14,19,19 82:1,19 87:20 88:11 109:18 135:11 logistical 16:14 logs 79:15,18 80:16,16 82:17 Lombardi 1:7 3:7,19 15:11 16:11 22:5 29:10 32:24 49:17 88:18 145:24 147:8 150:8 151:3 Lombardi's 29:7 32:20 140:17 long 36:19 147:1 longer 63:3 136:11 look 5:21 15:4 16:14 17:3,3,4 23:22 25:4 27:3 34:17,18 35:6 39:7 46:15 53:1 54:16 56:25 57:16 59:11 61:19 63:19 67:14,18 68:5 69:13 70:1 71:19 73:15 74:8 75:3,3 78:24 83:15,16 85:8 87:22 88:5 91:9 92:9 93:4 96:22 98:20 102:25 103:6 109:17 116:5 117:4 123:14 124:4 125:7 126:13 127:3 129:21 134:14 134:15,16 139:25 141:5
----------------	--------	---	--	---

141:10	manner 41:21	means 15:5 43:9	Midazolam	Mister 131:9,10
looked 6:1 24:5	manufacture	50:17	19:18,24	Misters 41:10
52:18 121:16	121:21	meant 6:12 79:5	141:14 143:16	misunderstand...
124:18	manufactured	81:1	144:1,7,15,22	23:20
looking 20:12	48:5,14	media 33:2,11,11	145:4,20 146:4	misused 63:11
22:7 23:8 31:3	manufacturer	33:13 95:23	146:10,14	mixed 27:12
35:4 52:20	21:4 72:1,4	medical 35:9,11	middle 125:20	mixing 48:11
58:15 62:14,16	manufacturing	36:2,10 58:24	137:15	ML 135:5
62:17 66:13	47:20 119:11	76:6,8,23 77:8	Midwest 4:13	MO 149:3
69:8 71:17 75:8	mark 5:12 8:15	77:17,18 78:13	150:1	moment 76:23
79:23 92:21,24	8:22 16:20	78:15,17,18	105:11 115:5	
103:8,9 116:23	24:17 65:6	86:14,16,16	138:14	
121:9 130:24	70:24 111:1	87:17 101:19	money 125:7	
looks 18:23	marked 6:5,7	102:22 104:22	131:12 132:15	
36:16,16 59:15	24:21 25:3,7,13	111:25 112:7	133:20	
133:15 135:23	28:5 65:8 71:1	112:10 113:9	moniker 143:2	
lose 27:13	111:3 130:21	113:15,22	monitor 103:8,9	
loss 37:7 119:8	market 50:16,22	132:12 134:4,4	monitors 87:11	
lot 16:24 20:17	marking 111:4,6	134:9	87:12	
27:18 63:3,14	material 122:8	Melissa 15:11	month 75:20,21	
93:15,25 119:1	125:20	30:3 125:24	morning 8:2,14	
123:9 127:10	materials 72:2	133:15	23:16,22,25	
lots 103:24	Matt 15:10	member 21:12	24:5	
loud 19:12	117:10,11	21:15,18 57:12	move 63:16	
Louis 3:18 64:20	matter 10:16	72:3 85:21	moved 108:18	
lower 119:3	71:15 150:17	86:14,17	moving 94:25	
Luby 7:23 8:3	mean 5:16 16:25	101:13 125:16	98:8,9 132:15	
L-E-N-G-E-R	17:5 30:20 36:9	142:24	133:20	
131:7	42:6 43:2 45:10	members 20:24	multi-page 79:2	
L-E-N-N-Y	45:11 57:23	20:25 21:7,21	M2 76:11 78:15	
131:6	58:5 62:14	21:22 99:10,13	78:17 87:5,6,10	
M	68:22 70:6	99:15 125:17	87:15,15,16,18	
M 30:5 118:17	72:15 75:2 76:2	137:13 144:22	87:19 88:13,15	
maintain 9:12	77:2,11,16 78:2	memo 38:13 51:6	90:7 126:5,6,7	
19:23 108:13	82:7,16 83:4	51:7,13,15 62:1	128:4 131:20	
maintained	86:1,3 90:15	131:1	131:20	
141:14	95:11 104:12	memorandum	M2's 87:9	
majority 28:8	108:15 110:11	50:3,15 51:3	M3 15:22,23 76:9	
making 34:25	110:20 118:8	memory 20:20	78:15,17 87:5,6	
56:11 74:3 82:6	119:22 120:13	111:18	87:10,15,15,16	
management	120:16 122:1	mention 91:22	87:18,19 88:13	
131:2 132:4,8	123:22 124:14	114:16	88:15 90:7	
manager 50:4,6	127:24 132:7	mentioned 92:5	100:15,17,21	
132:8 144:17	137:19 139:16	114:16	110:1,6,6,7,22	
145:8	140:9	mentions 21:4	126:5,11,12	
managing 98:7	meaning 24:9	Michael 4:8	127:6 128:4	
	100:11	Microbiology	131:20,20	
		123:15	mistake 13:18	

M3's 113:22	needed 40:20	note 45:25	O	82:6,13,15 86:3
M4 76:16,20	55:23 89:12	137:23 138:21	OAK 4:5	89:17,19 90:2,3
M5 87:4 128:11	90:4 109:11	138:22 139:16	object 12:18	92:16 104:21
128:12 131:20	137:5	139:20	41:19,22 44:25	offer 89:10
139:5,6 140:2	needs 16:14	notes 31:22 69:17	45:7 53:19 60:2	offered 46:1,1
M6 62:2,4,18	negotiate 56:18	93:25 137:4,7	60:23 61:7	90:14
87:4 118:12	neither 149:10	notice 119:10	64:15 68:25	office 4:4,9 7:13
131:20 139:5,6	Nelson 132:19,20	134:3	80:23 101:10	9:7,8 28:25
140:2 142:11	132:21	notify 96:18	101:21 102:1	31:14 32:18
142:11,15,24	Nelson's 134:5	notifying 29:8	104:24 114:3	33:5,16,24
147:11,11	never 11:17	November 58:7,7	120:10 122:21	35:12,13 36:2
N	new 13:19 30:22	58:8 72:23 73:3	123:4 137:17	36:20,22 37:1,4
N4:1	34:9 39:1 47:14	81:7,8,20,24	138:9	40:9 55:14
name 28:3 30:4	67:12 74:23	109:22 110:4	objected 43:14	108:14,16,18
41:17 42:2 43:3	105:15 146:16	111:9 127:20	objecting 62:19	126:2,3 128:17
44:4,15 58:8,10	Nicklasson 23:16	136:11	62:23 101:15	130:8 132:21
62:17 70:7	23:19 26:11	number 8:5,8	objection 12:6	133:3 134:5
72:18 92:4,4	27:9 34:16	10:21 11:5,5,6	20:6 40:18	138:23 139:22
93:10 95:19	38:16 39:13,16	11:7,14,22,25	47:21 48:19	150:5
97:14 98:25	41:10 73:11	12:5 25:17,21	50:24 62:12	officer 33:2,6,7
100:13 101:1	102:12,15	25:25 26:25	63:14,15 64:23	79:19 82:2,10
104:21 116:25	104:2 126:19	27:6,7 29:2	67:6 84:17	82:12
120:7 122:9	Nicklasson's	31:23 32:11,12	99:25 100:6	officers 79:18
152:7	102:21	35:8 40:12 42:2	102:16 113:12	80:4,21,25 81:3
named 89:7	night 6:19 8:3,11	45:13 49:22	114:15 115:7	81:4
91:22 101:13	nodding 109:25	52:18 57:10	122:18 138:18	official 19:1,2
names 21:8 39:23	131:23	58:10,12,13	146:23	oh 17:10 19:13
53:9,11,12	Non-confidential	81:13,14 82:22	objections 63:7	21:10 30:9
92:14 93:2,3	24:24	82:24 99:17	obligation 12:16	35:23 57:13
99:11 137:8	non-medical	116:9,9 118:17	obtain 11:1	58:25 66:23
139:3 140:1	76:7,13,24 77:9	119:1,7,8 123:9	56:14 100:5	81:18 87:13
147:24	77:18,21 78:14	136:19 141:8,9	obtained 56:17	103:10 110:13
naming 142:23	non-public 23:14	numbered 9:13	125:23	127:22 130:14
narrow 60:12	23:18 27:15,22	numbers 7:3	obtaining 51:4	131:6 136:3,18
nature 50:16	normal 77:4	11:8,10 53:9,11	139:17	141:8 143:20
93:8 119:6	normally 51:15	53:12 54:24	obviously 5:19	145:5 148:8
necessary 8:13	51:16,17 75:25	72:19 83:1,7,8	6:11 22:4 23:19	Ohio's 16:2
63:14 146:15	78:9	83:16 84:9,10	occur 30:23	okay 5:10,16,18
152:4	Nos 25:13	84:11,12,23,24	31:11,12 74:12	6:3,20 9:15
need 18:13 19:12	notarized 150:15	85:7,13,16	77:5 105:21	10:2,16,21
24:15,18,19	notary 150:14	92:20,23,24	occurred 74:12	11:11,20,23
51:25 74:25	152:18	130:10 137:8	75:14 96:14	12:3,10,13
76:3 77:7 85:6	notation 89:22	140:1,2,2	occurs 108:24	13:16,23 14:10
111:10,20	89:24 91:1	numerous	October 13:25	14:22 16:13,22
127:11 130:9	notations 31:15	120:16 129:24	odd 116:24	17:4,13,15,23
134:15 146:19	33:25,25 34:1,3	134:11 137:6	offender 35:11	17:24 18:21
	82:6 111:8		38:15 81:21	19:6,15,16,23

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 178 of 331

Appellate Case: 14-1193 Page: 164 Date Filed: 01/28/2014 Entry ID: 4118269

20:11,20 21:11	79:21 80:6,12	125:2,7,8,11,12	9:3 93:16 105:5	65:1,13,19
22:3,6,15,24	80:17 81:22,25	126:4,7,12,16	105:6 114:8	66:13,16,25
23:12 24:11,23	82:5,7,16,20,23	126:17,21	146:14	67:14,18 69:13
25:23,24,25	83:9,11,15 84:5	127:1,3,9,17,20	ordered 103:16	70:1 71:14,17
26:7,14,19,20	85:3,24 86:1,20	128:3,6,12,16	105:15 109:9	72:8 78:25 79:1
26:23 27:8,21	87:2,11,14,22	128:18,21	ordering 109:9	81:13,14,17
27:25 28:10,24	88:9,12,15,19	129:6,18,23,23	orders 82:12	82:20 83:15,19
29:9 30:8,8,19	88:24 90:6,8,11	129:23 130:14	ordinarily 55:6	85:7 86:2,12
31:7,14,20,20	90:17 91:1,7,9	130:15 131:10	organization	87:13,22 88:5,9
31:25 32:4,5,14	91:11,15,17,20	131:15,17,21	116:15 133:8	88:25 90:17,20
32:15 33:8,14	92:3,11,18 93:1	131:24 132:5	original 2:18 7:3	91:9 92:25
33:19 34:5,6	93:5,8,11,23,25	132:11,11,17	8:12 9:1,3,12	93:13 94:17
35:3,3,20,24	94:18,18,24	132:23 133:1,6	9:13 37:20,22	98:20 104:16
36:6,15,23	95:8,10,16,19	133:9,17,24	148:14,15	109:17 111:25
37:16 38:4,6,8	95:25 96:9,16	134:3,8,14,15	150:11	116:5,23
38:8,11,21,21	96:22 97:10,20	134:15,19,20	outcome 149:14	117:14,14
39:4,9,10,21	97:23 98:10,13	135:2,8,9 136:6	outsourcing	118:19 121:23
40:11 41:7 42:4	98:16,20,21	136:9,14,15	47:15	121:24 123:14
42:8,11,14	99:1,12,18	137:6,9,15,21	overlap 79:25	129:11 130:10
43:20 44:1,22	100:4,10,24	138:19 139:2,6	overseeing 78:13	131:24 132:11
45:18,24 46:5	101:17 102:9	139:15,23	Owen 33:7	141:5,8,9
46:15 48:16	103:10,24	140:3,8,19	Oxford 92:1,5,7	142:21 150:12
49:20 50:8,15	104:16,19	142:15 143:9	o'clock 3:12,12	150:14,16
51:18 52:4,5,16	105:5,9 106:2,5	143:10,14		151:6,7,9,10,12
52:20,23 53:2,3	106:8,11,25	144:1,4,13,18	P	151:13,15,16
53:14,24 54:9	107:3,10,13,23	144:25 145:6	packet 33:4	151:18,19,21
55:2,9,24 56:17	108:7,12,15,18	145:15 146:2	page 2:1,7,11,12	pages 2:14,15
56:23 57:5,9,13	108:20,23	147:10,15,18	7:3 14:9,13,13	7:24,24 8:5,7,7
57:17,23 58:3,5	109:6,9,14,17	148:4,11	8:8,16,16 9:19	8:8,16,16 9:19
58:5,14,20	109:17,22	Oklahoma 64:21	15:5,10 16:14	17:9,19 29:4
59:13,16,21,24	110:1,8,16,20	once 12:14 56:17	19:6 20:12,23	32:17,19 52:19
61:10,16,19,24	110:24 111:13	123:8	21:2 23:13	52:21 56:25
62:3,22,25 63:8	111:15,20	ones 10:13 18:23	25:25 26:5,6,12	129:24 141:4
63:18,20,24	112:14,20	18:24 92:20	26:23,24,24,25	paid 127:25
64:5,13,19 65:3	113:1,4,21,25	96:24 120:21	27:3,6 29:2,22	128:23 129:4
65:11 66:2,9,15	114:16 115:6,8	open 86:12	30:10,12,13	paper 16:15 17:5
66:20,24 67:10	115:17,23	opened 5:25	31:22 32:7,8,10	52:25
67:18,21 68:9	116:2,2,10,23	operation 98:7	32:20,23 33:1,9	papers 17:12
69:4,8,15 70:6	116:23 117:17	opinion 80:7	33:10,19 34:6	paperwork 54:7
70:14,23,23	117:21 118:1,7	105:1	34:10,11 35:7,8	paragraph
71:9 72:15,20	118:13,19	opportunity 52:2	37:17,18 38:9	104:19 111:24
72:22 73:22	119:1,6,20	opposed 24:10	38:12,13,16,18	112:10 131:14
74:6,8,9,20,25	120:1,8,20	82:9,9	39:5,6 40:12	141:10
75:17 76:5,22	121:9,16,19	opposing 54:21	49:19,22 50:1	paraphrase
76:22,23 77:14	122:5,8,11,24	options 22:16	53:1 55:10,13	141:11
77:16,17,21	123:6,14,19,25	oral 90:9	56:23,24 57:10	Pardon 15:18
78:12,15 79:13	124:18,22,22	order 6:23 8:9	61:19 63:19,21	49:2 64:7 70:3

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 179 of 331

Appellate Case: 14-1193 Page: 165 Date Filed: 01/28/2014 Entry ID: 4118269

78:16 99:21	75:15 87:5	125:21,23	60:4,6,6,8,15	placement 112:7
100:16 112:22	90:18 91:5	126:4 143:5	60:15,21,21	Plaintiff 3:19 5:2
113:7 136:4	100:5 102:11	personal 45:3	61:4,5,13 62:1	plaintiffs 1:5,10
part 20:14 37:13	105:9,10,15,17	47:1 51:1,12	64:2,13,17,21	3:5 4:3 5:13
87:9 89:5	105:21,24	personally 45:21	65:5 67:22	6:11 7:13 8:2
112:20,23	106:17 107:9	113:19 114:5	68:17 72:18	8:10,14 9:24
118:1,3 122:23	108:10,21,24	personnel 36:20	73:8,11,11	23:15
130:11,12	109:10,11,19	76:6,7,9,24	90:25 93:10	plaintiff's 11:18
132:23 133:1	110:1,3,11	77:18 86:15,16	100:8,8 101:25	22:23
142:6	119:17 120:22	86:16 87:18	105:24 107:4	plan 22:13,14,15
participate 69:20	120:25 121:5,7	112:7,10	108:10 109:15	22:19 146:10
participated 28:4	121:11 122:6	113:16	114:2,5,6 115:3	plans 47:13
particular 62:4	123:17,19,22	persons 14:1	115:13,14	Plaza 3:14
118:9,13	125:5 126:22	15:5 21:21,21	117:24 118:2	please 20:1 25:16
parties 24:13	134:25 136:12	person's 14:2	118:23 122:12	30:4 38:22 53:1
54:21,21 55:7	people 15:12,15	pertain 64:5,8,11	122:15,17,20	59:12 61:25
149:11,13	21:24 34:2	68:2,6 85:1	122:22 123:1,2	63:19 65:7
partly 51:24,25	44:19 58:16	pertains 26:11	123:3 126:20	67:18 70:1,25
51:25	67:8 75:24,25	pharmaceutical	127:1,19,25	71:3 73:23 75:9
parts 28:24 78:19	76:3 77:21 80:3	48:25 49:3,11	142:14,15,25	81:14 86:19
78:20	95:21,23,25	50:16	143:5,6 147:12	92:9 111:2
party 58:9	96:1,6 97:16	pharmaceuticals	147:14,19	116:5 136:15
pass 140:19	128:22 137:12	51:5	pharmacy's 47:3	136:19 138:7
patient 104:1	perfect 95:6	pharmacies	126:21	150:10,13,15
pay 125:17	performed 120:5	39:23 45:13	phone 42:2 52:18	point 11:13
128:24 133:23	120:17 121:5	52:9,17,22,23	53:11,12 71:7	22:11 24:20
payment 125:12	performing	53:13,14,16	72:19 82:22,23	39:22 46:2
125:21 126:18	122:17,19	55:25 59:17	83:1,7,8,16	51:19 53:21
128:6,7,19	124:20	pharmacist	84:9,10,11,12	76:8 130:9
131:12	peripheral	59:21 62:15	84:23,24 85:7	138:10 146:11
payments 116:4	111:19 112:2	63:17 67:9	85:12,16 99:17	pointed 59:7
128:7	113:5,10	107:8 117:25	137:8 140:1	85:16
pays 129:7	perjury 152:8	118:23	photograph 93:5	pointless 43:3
PDF 148:17	permits 64:1	pharmacists	93:6,7	policy 18:8,12
peaked 60:13	permitted 140:10	48:16 68:16,17	84:9	84:9
penalty 152:8	perpetuity 44:19	pharmacy 21:5	portion 19:7	portion 19:7
pending 3:17	person 36:2 37:4	41:8,9,12,17,18	24:21,24 44:20	24:21,24 44:20
39:15	42:8 62:18 68:3	42:3,9,12,15,21	portions 25:2	position 11:17
pentobarbital	68:7 70:7,10	43:3,10 44:4,15	25:2,9 36:3	25:2,9 36:3
16:2 19:18 22:8	74:1 76:19	44:23 45:9,19	67:2 99:8 115:1	67:2 99:8 115:1
22:13 39:24	78:10 81:25	46:2,4,9,10,18	143:4	143:4
48:1,5,5,13,14	91:22,24 96:7	46:21,24 47:10	possible 6:12	possible 6:12
48:18 49:1,4	97:13,21 98:10	47:18,18,20	51:14	51:14
50:22 52:10	100:14 101:7	48:1,17 52:13	post 80:5 81:20	81:23
56:3,8 59:2,17	102:9,10,14	52:14 53:15	81:23	potential 56:12
61:13 68:20	108:8 110:3	56:19 58:23		
72:2,10 73:7,10	118:9,13	59:24,25,25		

potentially 12:25 42:18 45:8	148:9	26:13 51:4,15 77:10	75:15 78:22 89:6,10,22	134:23
practice 18:11 76:1 77:9,18,21 77:24	presumably 45:13 125:21	procedures 24:2 27:17 29:21	111:23 112:9 112:21,24	purchase 56:11 purchased 141:24 143:16 144:16 145:18 145:21 146:4
practices 47:20	pretty 10:6 17:3 32:19 99:18,23 107:25	proceed 44:2 140:13,15	113:6,11,15 141:3 142:6	purchases 144:14
preceptor 67:24 67:25	prevent 39:15	proceedings 17:14 52:6 148:20	143:20,23 146:5,16,19 147:4	purported 101:24
preparation 18:5 22:2 30:11	previous 7:5 71:9	process 39:16 71:23 77:4	147:4 protocols 15:13 23:18 25:3 27:15	purpose 54:9,16 54:23 63:5,15 89:8 111:16 115:7
prepare 87:6	price 56:6,18	procurement 51:4	provide 12:2 50:12 59:8 67:5	purposes 19:24
prepared 19:21 20:5,8,9,21 28:1,8,19 33:24 33:24 80:20 107:21 113:18 121:14	pricing 50:19	produce 48:12	74:20 85:14	push 78:6
prepares 77:8	primarily 20:9 147:22	produced 3:10 7:19 8:8,12,13 8:18 9:14,19,23 84:19	104:20 105:3 129:3	put 14:20 19:14
preparing 28:4 28:11 30:21	primary 112:1 113:9	product 50:19	129:3 provided 2:9,10 5:13 6:17 8:20	75:2 103:20,21 106:9 120:14
prescribe 87:4	printing 38:2	production 7:10 9:13	12:17 45:19 50:10,11 51:3 67:11 71:10 74:14,19	124:25 148:14
prescribed 102:10,11	printout 17:17	professional 61:12 149:4	provider 58:24	putting 35:14,14
prescriber 58:25 101:23 103:13 103:20,21 104:17,22 122:13 128:14 128:15	prior 75:21 94:25 94:25 108:19 109:4,6 150:16	progress 39:14	providers 131:13 131:14,17,18	P.M 5:8 109:23 125:1 148:20
prescriber's 101:18 103:23	prison 44:24 95:12	promise 127:4	provides 22:7 56:6	Q
prescribing 139:5	prisoner 87:12 87:16 92:1	promoted 47:20	providing 39:24 59:1 85:13	qualified 12:20 47:15
prescription 21:18 100:5,9 100:12,15,17 100:22 101:7 102:15,22 103:1,15,25 104:13,23 105:7	prisoners 140:4	pronunciation 125:25	59:1 85:13 provisions 47:16	quality 46:10 116:20
prescriptions 59:8 102:25 104:5,21 105:4	prisons 44:24 45:14,20	proof 129:4	62:6 142:11,23 147:12	quantities 87:20 87:21
present 7:5 75:1 75:13	privilege 86:6	Propofol 16:4	pseudonym 62:2 62:6 142:11,23 147:12	quantity 19:11 40:20,23 144:4
presentment	privileged 106:13	proposed 18:23 18:23	pseudonyms 76:2 139:4	question 5:11 8:25 10:12 12:6 12:19 13:16,23
	probably 31:25 58:1,18 72:19 84:24 118:21 127:9,10 145:17	protect 54:24 83:3	public 33:2,5,6,7 55:6 64:20 146:16 150:14 152:18	14:4,5,25 15:2 15:3 18:3,16,17 23:1,3,14 24:7 32:17 35:21
	problem 16:14 27:5 43:2,10 129:19	protecting 44:16 84:18 125:18	publicly 54:20 67:3	36:12 40:11,18 41:20 42:23
	procedural 80:13	protocol 13:25	pull 17:19 23:7 49:18 52:23 56:23	43:25 44:10 45:1,8,19,23
	procedure 19:17	14:2,3,12 15:4 15:7,16,17,20	pulling 49:22	47:21 48:19 50:24 52:9
		15:24 18:14,18 19:1,3 21:20 22:2,7,8 23:14 24:3,9 27:22 30:23 34:9	punishment	53:20 55:8 60:3

60:5,11,24 61:1 61:8,9 62:12,20 62:20,24 63:1,3 64:16,18 66:5 67:7 69:1 70:18 75:8 79:14 80:24 91:12 96:20 98:11 99:25 100:7 101:10,11,15 101:22 102:5,6 102:17 104:15 104:25 113:12 113:16 114:6 114:12,13,14 115:11 117:12 120:4,11,17 122:21 123:5 124:17 128:25 137:18,25 141:2,11,13,16 142:9,20 145:2 145:3 146:24 questions 2:1 10:1,8 11:9 12:11 14:16 35:21,22 42:18 43:11,15,22,23 65:24 121:19 142:11 143:13 148:5,6 quick 34:17 108:2 147:6 quickly 69:2 99:23 100:1 quite 81:6 143:11 quotation 124:12 124:15 quote 56:15 112:9	raw 72:1 read 5:22 19:8,12 19:13 27:2 39:5 39:5 94:13,19 94:23 95:17 114:12 130:17 135:8 136:8 141:13 148:10 150:13 151:6,7 151:9,10,12,13 151:15,16,18 151:19,21 152:2 reading 90:18,20 103:16 138:5 151:4 reads 16:24 ready 10:3 140:19 real 34:17 48:8 69:2 really 63:1 85:6 Realtime 149:4 reason 6:1 8:4 100:21 113:4 129:22 140:14 151:6,8,9,11,12 151:14,15,17 151:18,20,21 reasons 101:10 114:4 recall 141:18 receipt 57:12 125:16 127:19 127:23 128:9 received 5:14 6:14 23:21 108:9 110:1 receiving 117:19 118:14 Reception 28:14 28:16 134:21 receptor 67:23 Recognizing 106:8 recommended 145:25	recommending 146:1 record 5:24 6:8,9 7:10 11:13 17:15 25:2 28:12 29:20 30:1 33:17,18 40:2 44:3,6,11 44:16 46:1 49:22 51:20 55:13,15,24 64:20 68:11,13 68:14 80:22 81:5 84:17 85:11 86:8,9 87:1,25 88:23 88:24 91:18,19 94:15 95:9,10 103:7 108:4,6,7 114:15,17,21 114:23 115:24 116:1,13 124:23,24 125:3 130:15 130:19,20 134:22 138:16 138:17 139:13 139:14 recorded 44:18 records 102:22 redact 9:18 55:5 67:4 69:21,24 82:23 84:8,9,13 84:17 85:7 redacted 7:18,19 8:12 9:7 53:7,8 53:9,10,15 54:8 54:15,22 55:10 58:10 64:25 65:3,4 67:20 69:4,18,22 70:17 71:7 72:15,17,21 82:21,25 83:5,7 83:8 84:10,25 86:3 93:9 103:1 116:7 117:1,2	119:8 122:8,11 123:12 124:14 124:16 125:20 137:6,11 redaction 53:22 53:24 54:23 55:4 69:23 118:20 redactions 7:4 9:3 53:3 54:2,4 64:10 83:16 84:5 86:6 103:11 137:12 reduced 149:9 reference 32:21 74:3 83:19 references 82:18 107:18 referred 137:16 referring 31:5 130:11 refers 50:15 142:15 reflect 18:11 88:25 119:17 124:10 144:13 reflected 65:22 106:22 117:13 117:14 120:6 124:25 134:24 reflecting 95:7 reflection 116:20 reflects 65:15 90:17 106:20 119:10 121:20 125:12 132:12 refresh 20:20 refuse 104:23 regarding 107:6 register 47:14,15 registered 37:6 47:13 149:3 registration 47:4 64:3,4 Rehabilitative 35:19 37:12 reissued 7:3	relate 124:1 related 43:17 91:25 120:22 120:25 149:10 relates 138:10 relating 142:11 relation 90:11 relative 149:12 relatives 96:6 release 146:16 released 146:19 releasing 54:11 relevant 55:7 reliability 46:9 46:10 remain 39:17 remember 11:9 34:20,25 40:4 40:25 75:18 96:20 113:3 125:1 138:7 141:15 146:1 remembered 75:8 remind 137:4 reminded 141:24 145:19 remote 127:7 removed 8:7 86:7 123:9 render 152:5 renewal 66:20 repeated 33:22 report 49:14 93:18 121:14 123:15,25 reported 64:20 124:1 reporter 3:15 4:12 5:4,12 141:12 149:1,2 149:3,4,4 151:24 reports 49:17 117:18 120:16 representation 6:2
---	--	---	---	---

representatives 33:12 138:11	responsible 29:1 35:13,14 76:1	risk 43:18 RN 36:8	schedule 90:14 90:16	103:3,4,5,10 111:10 116:4
represented 16:2	97:17 118:7,10	Rohrbach 118:14	scheduled 105:17	117:5 123:1
request 16:3 41:1 50:8,13 71:10 89:20 90:1 104:20 107:8	responsive 13:19 13:20	125:24,25 126:1	Scheulen 15:11 30:3	129:18,22 130:4,6,7 134:21 136:3
requested 75:6 75:10 98:17,22 104:20 105:4,6 124:12 139:22	restate 115:10 result 64:10 resulted 8:7 results 124:1	role 71:22 roles 14:3 room 39:13 97:12 98:2 105:24 140:10	Schnucks 52:14 screen 14:21 sealed 114:23 searching 16:25	seeing 20:20 seen 60:19 102:7 sees 122:16,22 segue 96:10
requesting 131:12	retail 64:2 retained 2:19 25:11	RPR 149:19 run 137:15,22 138:4,23 139:17,18,21	second 7:24 8:6 11:18 14:23 20:1 26:12,15 38:2 39:7 40:1	selection 32:25 33:10
requests 89:17 98:19	return 7:15 150:15	Russell 28:19,21 28:21 38:14 39:12 135:21 135:25	64:2 79:10,22 81:23 85:5,8 86:21 92:25 94:6 101:9 108:5 115:25 131:14 136:1,7 136:16 138:2	sell 39:24 40:13 41:2 61:6
require 43:25 51:9 82:12	returned 6:24 7:1 90:19,22,23		144:19 147:22	sellers 56:13
required 82:14 100:8	90:24 91:2		secondary 112:1 113:9	send 127:25
requirement 56:10	reveal 44:1 45:8 60:3 85:15 114:9 147:24	S	131:14 136:1,7 136:16 138:2 144:19 147:22	sense 24:16 57:24
requisition 133:12,13	Revenue 129:3	S 4:1	seconds 88:21	sent 5:14,15,22 6:10,13 7:23
requisitions 134:4	review 10:17,18 54:2,4,6,9	safe 108:16 saline 108:25 sample 124:1	secret 85:18,23 86:5 101:14	11:25 117:25 118:1,4
rereviewed 9:5	reviewed 9:2 54:7	saved 91:7 saw 54:23 65:11	secretary 62:16	separate 62:6 96:8
research 15:6 16:7 42:7 46:13 47:9 49:13 61:14	revise 13:17	saying 5:24	secrets 137:13	sequence 29:22
reserved 5:6	Richard 92:1,6,7	11:19,21 27:22	secure 138:22	29:25 30:17,22
resolving 16:3	right 8:19 11:15 19:4 21:6 22:9	36:19 55:3 82:17 88:3	security 24:2 27:18,19 54:24 98:7	31:8 34:7,9
respect 10:21 109:2	23:23 26:21 30:9 31:10 35:3	120:1,2 121:6 143:12	secretary 62:16 27:18,19 54:24 98:7	38:14,16 87:18
responded 11:5,7 99:15	respect 10:21 109:2	says 9:24 21:6,7	service 63:4 served 11:17 67:3	serve 63:4
response 13:23 15:9 16:1 86:13 96:16 105:23 142:19	43:4,5 44:9 50:12 51:22 58:6 59:22 69:7 75:12 81:9	25:24 40:14 58:12 63:4 72:16 83:20 94:11 98:24	services 4:13 35:19 37:12 131:13 133:23	service 58:24 129:4
responses 10:9 10:11,14 11:4 12:5 13:21 25:6 86:11,23 98:14 122:2	86:22,25 88:4 89:19 92:23 95:5 97:3 114:23 121:1	103:15 104:19 105:3,8 112:9 119:20 124:1 124:11 128:22	set 7:19,25 8:12 22:21 23:9 24:8 26:15 27:3 30:8 34:20 35:8 38:1	14:8 16:15
responsibility 54:13	123:12 124:13 127:21 129:16 129:17 134:25 135:6,20 141:1 141:8 142:3 119:4	133:10 134:22 135:2 137:15 137:19 144:21 scanned 130:9 scanning 8:19 scenarios 90:3	38:4,6,21,21 43:13 44:19 46:23 54:3,4 65:17 71:2 72:7 75:5 80:9,16 82:18 86:12 93:4 94:11	17:16 22:23 27:11 52:24 75:4,10 80:2,2 86:11,19 sets 23:17 27:25 81:5 136:5 setting 95:4

seven 3:12 14:13 14:14 15:5 71:14 86:12 97:2 shed 121:17 sheet 40:11 151:1 sheets 150:12,14 150:15 shielded 137:12 shift 81:24 short 99:18 shorthand 5:3 149:3 show 33:13 40:6 65:9 70:17 86:10 111:10 148:13 showed 134:11 showing 23:24 88:16 shown 142:19 shows 73:2 sic 57:19 side 27:12 54:15 SIG 103:15 Sigma-Aldrich 70:15 71:22 sign 10:14 87:19 147:15 148:10 150:14 signature 5:5 58:9 132:17,19 136:9 148:8 150:12,14,15 151:23 signatures 88:12 88:16,17 133:11 signed 10:11 36:22 37:1 133:15 147:13 147:13 148:3 Signing 88:15 signs 87:18 similar 18:23 29:11,18 59:15 72:14 101:23	121:19 144:4 similarly 86:1 144:10 simple 143:11 simply 92:15 simulate 76:25 77:2,5 Sincerely 150:18 six 14:9 15:10 97:1 111:24 slash 39:12,19 135:4,4 small 19:7 Smulls 41:13 73:13 105:13 105:20,20 125:5 147:5 Social 54:24 sodium 123:17 123:20,22 sold 40:17 solution 109:1 123:18,20 somebody 36:22 84:18 somewhat 147:23 soon 146:18 sorry 11:16 19:12 20:7,14 26:7 29:17 33:20 37:11,24 40:12 57:13 58:7,25 59:3,10 67:25 70:16,18 79:4 81:11 93:22,24 94:22 125:10 129:11 130:1,25 131:4 sort 21:11 37:4 53:8,12 62:9 69:25 70:7 74:1 76:19,24 77:2 79:11,22 108:15 110:8	116:6 118:22 118:23,24 source 70:15,16 70:16,20,21 sources 45:16 speak 34:23 47:8 speaking 96:9 specific 14:5 82:14 98:6,19 119:5 140:11 141:5 145:22 specify 86:14 speculation 50:25 122:23 speed 85:9 spell 30:4 131:5 Spillane 4:8 20:3 85:19,21 109:25 139:13 spring 144:8 St 3:17 64:20 staff 35:18 36:11 77:8,9 78:13,14 78:15,17,18 99:10,13,15 stand 37:10 standard 70:15 70:15,16,20,20 standpoint 80:13 start 6:20 18:17 20:12 25:23 34:11 52:3 63:1 81:6 started 5:8 141:2 starting 77:19 96:19 starts 32:16 state 3:16,18 16:1 29:11,17 32:25 33:2,2 55:14 64:13 85:18,22 86:5 92:15,16 93:2	94:11 95:23,24 96:3,7 101:14 111:10 133:1,8 137:13 149:5 stated 10:22 25:5 96:16 statement 7:7 94:13,19,21 95:17 106:6 112:3 113:4,8 113:11 states 1:1 3:1 22:17 state's 29:13 33:23 38:10,12 94:23 95:18,20 status 82:13 statute 54:17 stay 39:14 99:10 99:19,23 steps 10:23 11:1 46:6 sterile 107:19 Steve 15:19 stick 32:19 STIPULATED 5:1 Stoll 50:3,5,9 stop 16:3 88:20 138:1 store 105:24 106:7 strapped 77:11 Street 4:5,10 150:6 stuck 32:9 79:3 subject 107:5 submitted 18:24 18:25 subscribe 152:7 subscribing 151:4 subsection 19:16 21:6 Subsequently 6:23 substance 48:12	64:3 107:21 152:4 successful 124:14 successfully 75:7 sufficient 19:11 suggest 17:1 51:18 suggesting 13:18 suggestion 25:6 Suite 4:14 sum 136:9 summary 35:10 35:10 sun 95:2 Sunshine 71:10 supersede 113:22 supervises 78:12 supplement 11:3 12:16 supplemented 11:11 12:4 supplementing 75:5 supplied 41:8,12 44:23 45:13 61:21 144:14 supplier 20:25 21:11 145:4 suppliers 144:22 supplies 19:23 61:13 supply 35:12 40:21,23,24 41:9 52:10 75:9 87:4,5 support 97:12 suppose 45:10 supposed 78:23 Supreme 111:9 sure 10:4 12:9,20 20:2 23:5 24:6 24:12 26:17 27:5 34:24 43:5 43:16,25 54:16 54:20 65:23 68:12 71:4,20 75:18 79:19
--	---	--	--	--

81:10 86:25	150:11	130:22 131:24	118:23 127:5	81:24 86:11
88:22 96:24	talk 74:9 84:23	136:15 137:3	134:12 136:6	135:23 136:2
103:7 112:6,6	96:10 111:18	138:8 139:25	139:23	thought 9:1
116:12 118:25	111:20 113:25	147:1	things 13:4 27:20	19:13 23:17
120:12 121:2,9	138:11,12	telling 71:24	29:5 30:23,23	129:18
121:15 129:13	talked 101:10	80:17 84:20,22	31:9,11,13 34:2	three 11:6 55:25
130:15 135:10	124:9	147:11	78:23 79:10,24	55:25 56:12,25
136:18 138:3	talking 7:8 13:3	tells 109:22	80:22 84:10	57:6,21,22,24
138:13,15,23	14:7 24:2 25:21	temperature	85:9 98:7,7,9	59:22 63:21
140:25 146:7	28:12 52:16	105:25	99:14 103:12	66:12 67:15
surprise 80:16	63:25 75:5 84:8	ten 105:12	107:19 125:7	108:9 144:2
Susan 4:9 128:16	120:21 135:15	109:10	138:22 141:1	time 8:6 12:23
128:17	146:5	term 14:11 22:12	147:10	13:7,18,20 26:8
suspect 24:7	talks 51:13	37:21 80:15	think 6:10 10:2,6	36:19 51:23
117:10	task 55:4	terms 24:12 41:1	14:20 16:13,18	73:17,20 74:10
suspected 66:8	tasks 14:3 86:14	48:8,9 75:23	16:18,23 17:2	83:7,19 84:14
switch 126:12	86:18	76:8	17:23 23:10,23	90:12,13,15
sworn 3:10 5:9	team 14:2,12	Terre 110:18,22	26:3 27:14,16	96:19 107:14
9:23 149:7	15:4 20:24,24	144:17 145:7	32:6,6,7 37:21	114:10 127:11
syringes 77:8,10	21:7,12,15,18	Terry 39:12	37:25 39:21	142:1 145:18
77:24,25 78:2,6	21:21,22,25	135:21,25	42:23 43:11,18	times 59:22
87:6 93:7,9	57:11 72:3 85:2	test 117:23	44:1 50:21 57:1	63:15 79:24
110:12,13,14	85:14,15,22	tested 124:2	58:3 61:16	95:22
systems 44:24	86:6 101:13	testimony 149:6	62:20 63:13	title 36:6,11,14
S-C-H-E-U-L....	125:16,17	149:7	65:15 75:18	37:5,7 94:16
30:6	137:13 142:23	testing 21:14	79:9,25 80:25	97:14
	144:23	70:12,14 74:4	81:25 85:8,13	titled 33:11
T	telephone 8:3	85:20 109:12	85:17 86:2 90:3	today 7:2,6 8:18
take 5:16 10:23	tell 20:4 26:10	115:2,14	92:19 94:2,9	8:21 21:20
11:1 13:19	28:3 29:2 36:13	117:21 118:2	104:25 109:23	114:4,14
14:23 17:12	36:24 37:23	124:20 126:25	109:24 110:21	145:16
42:24 46:8	41:5,5 43:4,12	127:1	111:8 114:12	told 7:2 40:22
51:19 59:11	50:2,16 53:6	tests 115:3	114:25 116:2,3	45:21 48:3
61:19 63:3,18	61:25 64:10,13	thank 9:21 14:10	120:23,24	83:11 106:9,12
67:14 69:13	67:19 68:6,22	23:11 49:18,24	121:1,6,17	106:14,16,23
70:1 73:15	69:5,8,13,16	73:19 81:19	122:1 124:9	106:25 107:3
78:24 87:22	72:13,16 73:23	87:24 148:7	126:13 127:11	114:18,21
88:5 91:9 92:9	74:1 76:3 77:3	150:17	134:10,14	138:11 144:2
93:4 96:22	77:7 81:11 83:9	Thanks 38:25	137:18 139:23	Tom 98:24
98:20 101:3	86:18 88:17	39:3	140:24 144:12	tomorrow 127:4
102:25 108:2	92:12 93:8,11	thereon 152:6	144:24 146:8	127:7
115:5 116:5,11	93:11 95:20	thereto 149:13	146:18 147:2,3	top 26:25 29:4
119:24 123:14	102:4 106:11	151:4	148:4,4	39:6 66:16
124:4 125:7	116:6 117:21	thing 16:17 53:9	thinking 44:14	74:22 94:10,10
128:2,3 139:24	118:21 119:6	57:1 71:19 74:8	thinks 123:3	94:16 118:20
taken 1:10 5:3	119:18 123:20	79:23 91:13	third 13:24 14:8	122:8 127:21
10:5 149:8,12	124:19 129:20	94:15 116:24	56:6 57:16 64:3	topic 142:9

total 136:10	69:14 79:15	136:10	33:10 92:17	warden 28:19,21
totally 35:7	80:4,18,25 81:2	unredacted 68:5	vigorously	28:21 38:13
track 27:13	81:4,4,5 87:11	70:17 71:11	109:25	76:5,6 78:19
82:13	88:16 91:21	85:2 117:1,4	violate 148:2	97:16,23,24
training 74:9,11	92:13 95:22	121:16 124:18	visit 140:9	140:7
74:14,18,24	97:16 98:1	unsure 101:22	visits 140:5	wardens 97:25
75:1,2,23 76:23	104:3,5,8,19	unused 87:17	volatile 50:15,19	98:1
78:3,12 108:21	114:2,2 115:15	91:4,5	50:22	warrant 103:16
108:23 109:4,6	131:13 135:3,3	upper 66:21	volume 135:7	warranty 119:21
trainings 13:6,9	135:22 136:5	119:14	voucher 126:9	119:25 120:3
13:14 75:6,9,14	136:11,11	use 16:2 22:9	vs 1:6 3:6 150:8	wasn't 10:16
transactions	type 42:14 69:24	41:4 76:2 81:13	151:3	13:20 15:17,19
134:23	132:14	81:14 107:22	W	22:13 28:7
transcribed 5:5	types 80:22	108:25 112:15	wait 22:25 33:20	54:10
transcript 24:24	typewriting 5:5	132:2 133:20	66:4 79:4 93:23	watch 22:16 95:1
150:13	149:9	133:22 141:15	130:24 136:3	watching 78:14
transmitting	typing 38:5	142:7 146:10	waive 148:9	78:19,20,21
118:11	57:22	146:14 147:4	waiving 25:8	water 38:23,24
Travis 91:24	U	utilize 19:17	way 8:17 24:16	way 8:17 24:16
trial 150:16	Uh-huh 48:7	utilized 35:25	31:6 33:4 50:18	31:6 33:4 50:18
tricky 127:23	51:7 59:19 72:5	utilizing 16:4	63:5 75:3 76:15	63:5 75:3 76:15
tried 43:13 96:18	147:21	V	79:8 94:1 104:9	79:8 94:1 104:9
97:18	ultimately 41:8	vacated 99:24	104:10,11,15	104:10,11,15
trouble 26:4 29:5	umbrella 133:7	vague 41:20,23	106:9 111:23	106:9 111:23
true 45:11 96:23	unable 11:22	104:25 120:11	113:2 117:4	113:2 117:4
103:13 108:1	unavailable	valid 116:8	119:24 120:14	119:24 120:14
120:3 121:14	40:13,14,15,16	validated 115:1	127:7 131:21	127:7 131:21
128:3 134:12	understand 11:4	Vance 32:21	141:12	141:12
136:22 143:24	12:9 43:1 44:17	various 20:18	ways 10:19	ways 10:19
152:5,9	60:25 80:18	27:20 80:15	week 127:13,15	143:23
Truman 4:14	81:1 84:21	120:16	welcome 94:11	welcome 94:11
try 54:11 57:1	89:24 106:11	varying 131:16	went 7:17 8:11	went 7:17 8:11
69:24 130:18	112:4 114:20	vast 28:8	46:23 75:15	46:23 75:15
trying 23:7 42:17	139:3	vendor 70:20	78:10 82:25	78:10 82:25
58:15 86:17	understanding	verbal 106:6	83:4,7 93:16	83:4,7 93:16
97:20 127:23	6:4 11:13 84:8	verbally 107:1	100:25	100:25
146:3	107:20 109:13	verified 70:20	weren't 27:22	weren't 27:22
turn 11:16 32:15	111:22 118:6	Versed 89:1,5	52:10 54:11,17	52:10 54:11,17
Turning 126:7	144:8	version 69:17	107:3	107:3
131:24	unfortunately	70:17	West 4:10,14	West 4:10,14
two 6:25 7:22,22	130:16 143:10	versions 20:18	150:6	150:6
11:7,14,22,25	Unger 4:4 150:21	71:9	WESTERN 1:1	WESTERN 1:1
23:17 35:21	unit 131:2 132:4	versus 24:3	3:1	3:1
39:23 40:4 52:9	132:8	111:19	104:12 132:9	24:14 25:9 44:2
52:17 56:3 58:6	UNITED 1:1 3:1	victim 91:25 96:1	138:23 139:18	55:1 60:23 63:5
58:6,12,22 61:3	units 135:2,10	victim's 29:19	139:21 143:22	

63:25 74:23	92:16,17 93:2	113:14 140:8	\$8,000 56:6	1283 57:2,14
84:23 85:9	94:11 95:14,20	140:11 142:25	126:22 128:6	58:4,7,18 59:14
115:6 116:3,4	95:24 97:15	wrong 31:21,23	#	1285 122:5
148:9	98:18 122:22	31:25 57:10	#993 149:19	1287 67:14
we're 10:2 17:15	122:23 130:4,6	80:12 92:19,24	1	1289 69:13
23:23 25:8,15	131:23 133:10	141:9	1	1292 53:1 55:10
25:21 39:9 44:1	135:17 136:1,7	wrote 31:25	1	55:13
44:20 49:21	138:15 140:20	92:23 102:15	1	1294 116:6
57:1 63:25	144:20 148:7	139:20	1	117:14
73:15 75:4	149:6,8 150:13	Y	1	1295 123:14
78:22,23 82:17	151:2,23	yeah 6:16 14:20	1	125:8,8
84:6,7 85:9,11	witnesses 29:8,13	17:10 24:6	1	1296 125:8,9,10
86:17 87:25	38:10 94:23	25:22 31:24	1	125:12
88:2,5 92:21	95:18 96:3,7,11	32:9 35:20	1	1297 126:7
96:10 114:25	96:13 98:9 99:4	36:16 40:15	1	1298 57:2,11,19
120:2,2 121:9	99:8,12 135:19	79:6,7 92:8	1	128:9,9
124:24 130:11	136:5	94:4,8 95:5,5	1	1299 57:16,18,20
135:10,15	witnessing 32:22	97:3 108:17	1	58:8,20,21,25
139:10,24	wondering 80:1	Wood 128:16	1	59:6,11 134:14
we've 13:6 22:7	word 5:17 118:4	111:12 116:17	1	134:15
25:7 28:4 31:20	worded 57:15,21	123:4 127:15	10	13 2:11,12 58:8
43:5,10 51:20	111:23 112:18	132:6 134:18	2	65:19 71:14
66:13 101:10	113:2 119:24	141:9 146:25	2	72:23 73:3
101:13 107:24	wording 57:22	year 6:11 143:19	2	103:4 110:4
120:15 124:9	words 71:6,11	years 129:1	2	127:20
129:22 131:18	114:20	Yellow 52:18,20	11-12	13th 110:17
140:23	work 46:10	Yep 97:1	10	1300 127:3,17,18
whichever 63:5	68:17 126:1,1,2	yesterday 8:4	11-16-2012	1301 59:12,14
white 117:2	working 8:19	125:6	66:23	1303 136:15,20
wild 59:11	works 37:6 62:7	Z	6:18	1304 139:25
willing 64:21	117:22 126:3	Zink 1:4 3:4,18	12-17-2004	1305 49:19 50:1
68:22 69:5	worse 136:8	150:8 151:3	2:10	1306 116:23
100:22 118:10	wouldn't 28:22	\$	6:18	117:14
120:2 147:24	51:16 106:13	\$1,200 125:12,23	12:1	1307 70:1 71:17
withdraw 115:7	134:10	126:5	13:2	1310 72:8,10,13
138:17	write 31:9,22	\$11,000 128:7	13:10	1311 109:17
withdrawn 7:12	100:12,15,17	\$11,091 126:18	13:11	1312 72:8,10,12
9:1,14,20	100:22 105:7	\$12,500 133:25	13:12	1334 92:10,21,22
witness 5:6,9	writes 101:7	\$17,000 131:22	13:13	1335 92:10,22
12:20 24:2	writing 21:17	\$3,000 126:10,10	13:14	1336 98:20
26:16,19 29:11	31:15 44:19	129:9	14:1	140 2:3
29:18,19 32:9	102:22 106:5	\$3,091 126:24	14:2	143 2:4
32:13,25 33:3	106:20,21	\$300 128:9,10	14:3	15 1:11 81:8,24
33:10,23 34:12	written 31:21	\$5,000 132:12	14:4	91:9 111:9
38:13,25 39:3	33:25 51:10,14	133:13 134:1	15:1	150:11
45:17 71:20	51:15 89:5		15th	1524 91:17,22
86:3 92:15,16				

1541 91:17,23	2246 17:19,21	2652 39:5	6011 4:5
16 131:22	20:23 21:3	2656 34:10 35:4	62 83:19
19 81:7,20	141:4 146:5	2657 35:9 36:18	63 57:3
109:22	2247 19:6	37:17,22	64 30:10,13
19th 81:15	2248 141:5,7	2658 37:18,21	64113 4:5
110:17,17	2249 141:5 146:5	2675 38:9,13	65 2:11
<hr/> 2	225 20:16	2676 38:12	65102 4:10 150:6
2 2:10,17 6:16	2267 20:17	2679 27:4 38:16	65109 4:14
7:7 8:23 27:1	2399 134:16,18	2680 26:25 27:1	662 83:15
76:13 129:23	135:15	27:7 38:17,18	676 79:1,3,4,6,7
130:13,21	24 29:6 146:21	27 6:21 7:12 8:12	79:11 80:19
2:12-CV-4209-...	146:25	9:20 44:8 69:17	81:18
1:5 3:5	2405 26:9	2729 3:14	686 79:4,8
20 83:24,25 84:1	2417 29:6	29 105:18 147:5	689 79:1,14
93:24 150:3	2418 29:10,16	<hr/> 3	80:19 82:1,1,20
152:11	2420 29:13,18	365 :20 71:15	69 29:22
20th 72:25	2464 29:22	111:8	<hr/> 7
2002 111:9	2471 26:9 30:14	3:30 142:10	7 2:12,13,17 88:4
2010 15:8,14,15	30:15,16 31:22	30 6:21,23 88:20	111:1,3,4,6,25
2011 119:11	2473 30:17	106:17,24	148:12
2013 6:21,21,24	2474 30:18 31:20	107:9,14	7:02 148:20
14:1 66:19	2475 32:7	31 66:19 67:11	71 2:12
67:11 71:15	2476 31:24 32:7	3432 4:14	718 86:2
72:23 73:3	32:12	<hr/> 4	722 87:22 88:6,9
74:13,17	2492 129:24	4:30 83:24	88:11,25 90:17
121:21 143:20	130:2,3,22,22	4:54 83:20	90:20
2014 1:11 3:11	131:1	46 21:2	723 88:8 91:13
61:21 150:3,11	2494 129:10,12	48 73:20,21	<hr/> 8
2015 93:12,14,19	129:14,16	49 17:20 73:18	8 2:11,14,18
93:21 94:3,4	131:24	73:21	24:17 25:13,24
2016 119:12	2495 132:11	<hr/> 5	26:21 28:5
2018 121:25	2496 133:12	5 2:9,11,17 65:6	31:22 148:14
2043 93:5	2497 133:24	65:8 66:11,15	83 57:3
2048 73:16,18,23	2499 129:25	5:15 107:24	<hr/> 9
73:24 124:4,6,7	130:2,3	50 135:9	9 2:15,19 5:14
2049 73:16 74:6	2587 26:24 32:16	50MG 135:4	6:11,12,14
2056 73:16	2597 32:20	56 73:18,21	24:17 25:13
2057 126:13,15	2598 32:23	573)636-7551	26:23,24 28:5
2058 126:13,14	2599 33:1	4:15	32:16 38:22
207 4:14	26:2:14,15 27:6	<hr/> 6	148:14
2095 132:11	2600 33:9	6 2:10,12,17	9:05 109:23
21 83:20,22 84:2	2601 33:10	70:25 71:1	98 57:4
84:5 136:11	2609 33:19,20	6:05 125:1	99 134:17
2105 109:23	2610 33:19	60 30:12 142:21	993 1:12
211 4:10 150:6	2611 33:19		
22 13:25	2612 33:19,21		
	2651 34:6,12		

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 188 of 331
Appellate Case: 14-1193 Page: 174 Date Filed: 01/28/2014 Entry ID: 4118269

EXHIBIT C



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Red Light Cameras
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Death Penalty

5:25 PM FRI FEBRUARY 14, 2014

Judge Orders Pharmacy Not To Sell Execution Drug To Missouri, For Now

By [CHRIS MCDANIEL](#) (/PEOPLE/CHRIS-MCDANIEL)

Update: Governor says the state is prepared to proceed regardless.

(#update)

Update: Pharmacy hopes documents will be secret (#update2)



http://mediad.publicbroadcasting.net/p/kwmu/files/201402/Apothecary_Shoppe.png

[Enlarge image](#)

A federal judge has ordered an http://mediad.publicbroadcasting.net/p/kwmu/files/201402/Apothecary_Shoppe.png Oklahoma-based pharmacy not to sell the Missouri Department of Corrections its execution drug, at least until a hearing scheduled for next week.

A Missouri inmate scheduled to be executed Feb. 26 sued the pharmacy, hoping to stop the supply of the drug that would soon be injected into him.

The Apothecary Shoppe, a Tulsa-based compounding pharmacy, has supplied pentobarbital for three recent executions in Missouri but became registered to sell here only last week.

"[The Apothecary Shoppe] is temporarily restrained from issuing compounded pentobarbital to the state of Missouri Department of Corrections for use in plaintiff's execution by lethal injection," Judge Terrence Kern in Oklahoma wrote.

He set a hearing for Feb. 18 for both sides to make their case.

The state's controversial execution methods (and secrecy) were the impetus behind a legislative hearing in which state officials testified and for multiple bills aiming to curtail the Department of Corrections' power.

The lawsuit, filed by inmate Michael Taylor's attorneys on Tuesday, raises many of the same issues on which [we've previously reported](#).

<http://news.stlpublicradio.org/post/investigation-missouris-execution-drug-source-raises-legal-ethical-questions> Missouri is now relying on a compounding pharmacy to mix the execution drug. Compounding pharmacies are not regulated by the Food and Drug Administration, and their products have a significantly higher failure rate than those made by manufacturers.

In fact, a law prohibits pharmacies from creating a copy of an FDA-approved drug, like pentobarbital.

"[The Apothecary Shoppe] cannot produce this drug so that it's safe and effective, and there are all kinds of risks associated with that," attorney Carrie Apfel said in an

Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 190 of 331

<http://news.stlpublicradio.org/post/judge-orders-pharmacy-not-sell-execution-drug-missouri-now>

interview. "The drug can be sub-potent, which means it's not powerful enough to do what it's supposed to do. It could be adulterated or have a contaminant in it."

Apfel and her fellow attorneys are arguing that the drug's injection would violate the Eighth Amendment, which bars cruel and unusual punishment.

Taylor's attorneys asked the judge to issue an order restraining the Apothecary Shoppe from supplying the drug to the Department of Corrections. State officials have testified that they typically travel to Oklahoma to pick up the drug and pay for it in cash. (<http://news.stlpublicradio.org/post/three-missouri-offices-are-responsible-controversial-execution-plans>)

Judge Orders Pharmacy To Not Sell Execution Drug

To print the document, click the "Original Document" link to open the original PDF. At this time it is not possible to print the document with annotations.

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The Apothecary Shoppe did not respond to a request for comment.

"An execution using compounded pentobarbital sodium, or other compounded drugs involves injecting a drug of unknown composition," Larry Sasich, a pharmacy consultant, wrote in the court filing. "This carries a substantial risk of causing the defendant pain and suffering."

Other states have faced controversy for recent executions as well. In Ohio, an inmate took more than 20 minutes to die and was said to have gasped several times during that time. An Oklahoma inmate's last words were "I feel my whole body burning."

Taylor was convicted of a 1989 abduction, rape and stabbing death of a 15-year-old girl.

Updated 4:09 p.m., Thurs., Feb. 13 with governor's response.

On Thursday, Gov. Jay Nixon said the Department of Corrections is prepared to proceed with this month's execution.

"I mean, the Department of Corrections is prepared to carry out the execution on Feb. 26, pursuant to the warrant issued by the Missouri Supreme Court," Nixon said, when asked by reporters.

The Democrat also said the state has acted properly in trying to keep the supplier a secret.

Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 191 of 331

"It's important that they follow the law, and it's the law of the state that protects the privacy of certain parts of the process," Nixon said. "If folks want to shift that policy, just like that law that passed that allows for that privacy, then the legislature has the opportunity to do that."

http://cpa.ds.npr.org/kwmu/audio/2014/02/Nixon_on_execution_2_13_006p3 1:09

There are a few possible ways the state would be able to proceed. One is that it could have bought the drug before the judge's order. Both the governor's office and the Department of Corrections refused to disclose if the state currently has possession of the execution drug.

The state also has a backup drug.

In a sworn deposition last month, a high-ranking state official revealed that the state has a supply of midazolam to carry out executions, in spite of earlier assurances that the state did not have the drug.

23 Q. Okay. Does the Department now maintain supplies
24 of Midazolam or Hydromorphone for execution purposes?
25 A. No.

20 Q. Since you gave that answer, do you have any
21 information to include to correct that answer?
22 A. Yes; yes.
23 Q. And what is that?
24 A. I was reminded that we had purchased those items
25 as a backup. Yes.

http://mediad.publicbroadcasting.net/p/kwmu/files/201402/DormireMidazolam_0.JPG
[Enlarge image](http://mediad.publicbroadcasting.net/p/kwmu/files/201402/DormireMidazolam_0.JPG) (http://mediad.publicbroadcasting.net/p/kwmu/files/201402/DormireMidazolam_0.JPG)

Midazolam was the drug Ohio used in a recent execution that took more than 20 minutes. Witnesses said the inmate gasped and snorted during that time.

If Missouri were to use its backup supply of midazolam, the state would have to change the protocol, which currently allows only for pentobarbital.

Updated 4:49 p.m., Fri., Feb. 14 with the Apothecary Shoppe's response.

In a filing Friday afternoon, the Apothecary Shoppe asked the judge to keep documents about it confidential.

"Here, the legally protectable interests of defendant and the state of Missouri far outweigh the public interest in disclosure of the confidential documents," the Apothecary Shoppe wrote. "Missouri law expressly protects from disclosure the identities of members of an execution team."

The Apothecary Shoppe cited being a member of the execution team as a reason the documents should be sealed but also attempted to obfuscate if it is supplying.

"Whether that allegation is accurate or not, the aforementioned statute would apply with respect to inquiries into the identities involved in a given execution team and their various roles," the Shoppe's attorneys wrote.

But public records have already named the Apothecary Shoppe as the pharmacy selling the state its drugs. And the lawsuit pertains to the pharmacy supplying the state of Missouri with its execution drug, so they would have little reason to fight the suit if the pharmacy wasn't the supplier.

"It has the potential to cause public protest" if the documents were disclosed, the

Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 192 of 331

<http://news.stlpublicradio.org/post/judge-orders-pharmacy-not-sell-execution-drug-missouri-now>

Apothecary Shoppe said.

Missourians for Alternatives to the Death Penalty have been intermittently holding a vigil outside the pharmacy for the past couple of weeks.

Follow Chris McDaniel on Twitter: [@csmcdaniel](http://twitter.com/csmcdaniel)

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EXHIBIT D

I witnessed Ohio's execution of Dennis McGuire. What I saw was inhumane

I don't know how any objective observer could come up with any conclusion other than that injection was an evil way to go

**Lawrence Hummer**

theguardian.com, Wednesday 22 January 2014 13.51 EST

The last time I celebrated mass with Dennis McGuire, who was executed by the state of Ohio last week using an experimental two-drug concoction, it was the feast of the epiphany that marks the bringing of gifts to the newborn Jesus by the magi.

McGuire was one of just over a dozen Catholics among Ohio's 147 death row inmates who come to mass weekly in Chillicothe Correctional Institution. As part of the sacrament of anointing, I asked the others to pass by and lay hands on McGuire as a way of giving our brother back to the Lord as a symbolic gift. When I turned round to face them with the oils, I found the other 12 standing around him, surrounding him as though they were offering him back to the Lord. Tears were streaming down McGuire's face. That was the first time I'd ever seen him show physical signs of emotion.

I first began to visit McGuire in November. He told me about the evil act he had committed, the murder in 1989 of a young woman Joy Stewart who was pregnant and whose unborn child also died. He confessed his sin to me, and expressed sorrow for what he had done. I said he should pray for forgiveness from the woman he had killed, and from that unborn child, and over the course of the final eight weeks, I know that he did.

After that, I had to deal with him as I do anyone else who repents: as a forgiven sinner. It can be very difficult for people not in the religion to accept that with regard to a murderer, but the faith is clear: once forgiven, you are forgiven, no matter how heinous the sin.

On the day of his execution, last Thursday, I gave him his last sacraments at Southern Ohio Correctional Facility, which lodges the "death house". Shortly before the execution

was due to start, his son, daughter and daughter-in-law, who were with him at the time, asked me to come with them as witness. McGuire also said he wanted me there as his spiritual adviser.

I felt nauseous before I entered the room, as I had never seen an execution before. As the execution got underway, the nausea passed and was replaced by an intense feeling that I wanted to get out of that room, away from the horrendous act that was playing out before me.

I've seen people die many times before: in nursing homes, families I've known, my own mother. In most settings I've found death to be a very peaceful experience. But this was something else. By my count it took 26 minutes for McGuire to be pronounced dead.

We sat down in the death house – McGuire's children and daughter-in-law in the front row and me in the row behind them. At about 10.15am he was brought in and strapped to the gurney. With his arms spread and, not to put too fine a point on it, I whispered to his daughter that he looked as though he were on the cross.



Dennis McGuire. Photograph: AP

He made his final statement. He said thank you to Joy Stewart's family who had offered him some words of comfort in a letter they had written to him, and he told his children that he loved them and would see them in heaven. They began to put lines into him. That was unsettling, as from what I could observe they seemed to find it hard to get insert the IV and there seemed to be blood coming from his right arm.

At 10.27am, the syringe containing the untested concoction of midazolam and hydromorphone was injected into him. At 10.30am, three minutes into the execution, he lifted his head off the gurney, and said to the family who he could see through the window: "I love you, I love you." Then he lay back down.

At about 10.31am, his stomach swelled up in an unusual way, as though he had a hernia or something like that. Between 10.33am and 10.44am – I could see a clock on the wall of the death house – he struggled and gasped audibly for air.

I was aghast. Over those 11 minutes or more he was fighting for breath, and I could see both of his fists were clenched the entire time. His gasps could be heard through the

glass wall that separated us. Towards the end, the gasping faded into small puffs of his mouth. It was much like a fish lying along the shore puffing for that one gasp of air that would allow it to breathe. Time dragged on and I was helpless to do anything, sitting helplessly by as he struggled for breath. I desperately wanted out of that room.

For the next four minutes or so a medical tech listened for a heart beat on both sides of his chest. That seemed to drag on too, like some final cruel ritual, preventing us from leaving. Then, at 10.53am, the warden called the time of death, they closed the curtains, and that was it.

I came out of that room feeling that I had witnessed something ghastly. I was relieved to be out in the fresh air. There is no question in my mind that Dennis McGuire suffered greatly over many minutes. I'd been told that a "normal" execution lasted five minutes – this experimental two-drug concoction had taken 26 minutes. I consider that inhumane.

His family had been exposed to something horrendous. They cried and sobbed, held each other, held onto my hand, and at times turned away to hug each other so they didn't have to watch. And then there's the family of Joy Stewart, who I think were sitting next to us on the other side of a wall. I pray for them because I know they too have been through hell and back. My heart goes out to them, but I don't see how his death will bring them peace. All it means is that they witnessed somebody else die.

I have opposed the death penalty since I studied philosophy in college 40 years ago. My objection is based on a simple principle: all human beings are created with the ability to change, from what is not yet to what is, and that's as true in the womb as it is heading for the tomb. There can always be repentance.

To interrupt that process is to deny people the chance to repent of what they have done. Capital punishment is simply a way of society avoiding the possibility of changing lives. I'm not advocating the release of any of Ohio's death row inmates into society – they have all committed heinous acts, and society must be protected from them. But by incarcerating them, they pose no more threat. Everybody wants to play God instead of believing in him. That applies to the murderer as much as to all of us. In my opinion, the death penalty is nothing more than an exercise in vengeance that rightly should be reserved to the lord.

Putting my opposition to the death penalty to one side, there remains what I saw with my own eyes last Thursday. I don't know how any objective observer could come up with any conclusion other than that was an evil act.

Now that almost a week has passed, and I've had time to reflect, I ask that the governor

[Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 197 of 331](#)

<http://www.theguardian.com/commentisfree/2014/jan/22/ohio-mcguire-execution-untested-lethal-injection-inhumane>

of Ohio or the legislature end the death penalty in this state. It serves no purpose. People must seize this culture of death and stop it.

On Monday, I came to the prison for my usual weekly mass. I asked the remaining Catholic inmates whether they wanted to know what had happened to their brother. Most said they did, so I told them straight out, sparing them few details.

Some of them came up to me after the mass to talk. Ironically, they began to console me, saying that they were sorry that I had been forced to go through such a terrible experience. I found myself oddly comforted by that. I know they were being genuine – I've been with them long enough to sense when I am being played. For me, that underlines a vital truth: that even among men who have done such brutal things, redemption can be found.



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EXHIBIT E

Controversial execution in Ohio uses new drug combination

By Dana Ford and Ashley Fantz, CNN

updated 1:01 PM EST, Fri January 17, 2014

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Son of executed Ohio man breaks silence

STORY HIGHLIGHTS

NEW: Execution was "a failed, agonizing experiment," attorney says

NEW: A medical expert questions why the process took 24 minutes

Convicted killer Dennis McGuire reportedly says "I'm going to heaven"

Facing shortages, states are scrambling to find new drug protocols

(CNN) -- Ohio inmate Dennis McGuire appeared to gasp and convulse for roughly 10 minutes before he died Thursday by lethal injection using a new combination of drugs, reporters who witnessed it said.

McGuire was convicted in 1994 of the rape and murder of 22-year-old Joy Stewart, who was seven months pregnant. Her relatives were at Southern Ohio Correctional Facility in Lucasville to witness his death, according to tweets from [television reporter Sheila Gray](#).

McGuire's "children and daughter-in-law were crying and visibly upset," Gray tweeted.

She said McGuire, before the drugs took effect, thanked Stewart's family for a letter he apparently received.

"To my children, I'm sorry. I love you. I'm going to heaven and I'll see you there when you come," McGuire reportedly said, according to CNN affiliate WDTN.

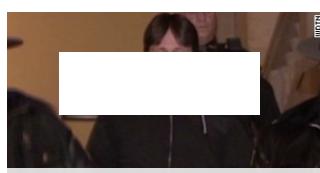
Columbus Dispatch reporter Alan Johnson said that the whole execution process took 24 minutes, and that McGuire appeared to be gasping for air for 10 to 13 minutes.

"He gasped deeply. It was kind of a rattling, guttural sound. There was kind of a snorting through his nose. A couple of times, he definitely appeared to be choking," WDTN quoted Johnson as saying.

The convicted murderer was pronounced dead at 10:53 a.m. ET.



Witness: Inmate gasped during execution



Why should executions be humane?

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Killer executed in Ohio

The execution generated controversy because, like many states, Ohio has been forced to find new drug protocols after European-based manufacturers banned U.S. prisons from using their drugs in executions -- among them, Danish-based Lundbeck, which manufactures pentobarbital.

According to Ohio's corrections department, the state used a combination of the drugs midazolam, a sedative; and the painkiller hydromorphone.

Both the length of time it took for McGuire to die and his gasping are not typical for an execution, said Howard Nearman, an anesthesiologist at University Hospitals Case Medical Center in Cleveland.

"Why it took 24 minutes, I really can't tell you," he said. "It just makes you wonder -- what was given? What was the timing, and what were the doses?"

In an opinion piece written for CNN this week, a law professor noted that McGuire's attorneys argued he would "suffocate to death in agony and terror."

"The state disagrees. But the truth is that no one knows exactly how McGuire will die, how long it will take or what he will experience in the process," wrote Elisabeth A. Semel, clinic professor of law and director of the Death Penalty Clinic at U.C. Berkeley School of Law.

Speaking on behalf of McGuire's legal team, attorney Allen Bohnert called on the governor to impose a moratorium on future executions because of what took place Thursday.

"At this point, it is entirely premature to consider this execution protocol to be anything other than a failed, agonizing experiment," he said in a statement.

"The people of the State of Ohio should be appalled at what was done here today in all of our names. Ohio, like its citizens, must follow the law. The state has failed."

CNN's Sonny Hostin said that McGuire's execution will likely spark debate over whether how inmates react to the use of the drugs constitutes cruel and unusual punishment prohibited by the U.S. Constitution.

"Whenever there's a change in the lethal injection process clearly it's subject to legal proceedings and perhaps we will see those," Hostin said.

Ohio ran out of pentobarbital, which is a narcotic and sedative barbiturate, in September, according to JoEllen Smith, spokeswoman for the Ohio Department of Rehabilitation and Correction.

In response to that shortage, the department amended its execution policy to allow for the use of midazolam and hydromorphone.

Stewart's body was discovered by hikers near a creek in southwestern Ohio in February of 1989. Her throat was cut and she had been sodomized.

Death penalty states scramble for lethal injection drugs

There are currently 138 men and one woman on death row in Ohio.

The state was set to execute death row inmate Ron Phillips using the new drug combination last year, but Gov. John Kasich granted the convicted killer a stay of execution pending a review of a



Ex-New Orleans Mayor Ray Nagin guilty after courtroom 'belly flop'



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possible organ donation to his family members.

Death penalty in the U.S. gradually declining

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A death row interview

CNN's Joe Sutton, Ross Levitt and Deborah Feyerick contributed to this report.

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 203 of 331

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 **Paul Evans** → Mpeasman • a month ago

If if if its all a question of where or how you draw the line.

The system is not perfect therefore it WILL be the case that an innocent person will be killed by the process. I can never support a system that could result in the death on an innocent person (you may be different). Because of that position find I cannot support the process. This is simple logic.

96 ▲ | 13 ▼ • Reply • Share >

 **nyboy** → Paul Evans • a month ago

I think your logic fails you when you take it to the extreme cases like the Fort Hood shooter, Colorado theater shooter, etc. There is absolutely no doubt in those cases unless you have a distorted view of reality.

72 ▲ | 5 ▼ • Reply • Share >

 **Paul Evans** → nyboy • a month ago

And where to draw the line is something that I have struggled with so I would rather err on the side of caution. The issue is how do you encode that in law?

17 ▲ | 3 ▼ • Reply • Share >

 **cyborg_destruct** → Paul Evans • a month ago

Maybe allow the appeals process to have a limit of three years and then stop? Sounds like a reasonable amount of time. Although I think three years in a real prison would make me want to commit suicide rather than be with the animals, and I typically love animals! LOL

Not the human kind of animals however.

12 ▲ | 4 ▼ • Reply • Share >

 **James** → cyborg_destruct • a month ago

What about all of the people who have been exonerated after 3 years?

15 ▲ | 1 ▼ • Reply • Share >

 **DoctorFeelgoodMD** → James • a month ago

I live in Texas and strongly believe in the death penalty for convicted murders and other crimes. It acts as a deterrent for one. Second, we the people are not going to spend hundreds of thousands of dollars keeping scum alive by housing them. The death penalty is not cruel or unfair. We as humans have carried this out since the beginning and should continue to do so until the end of time. Do the crime and face the consequences. If new drugs don't work, shooting squad works great.

35 ▲ | 7 ▼ • Reply • Share >

 **James** → DoctorFeelgoodMD • a month ago

You aren't really making any arguments here. All you're doing is stating your opinions.

Where is the evidence that it deters crime?

We the people, pay for prisons to protect society from the prisoners. If you've heard 6th graders debate the death penalty you would know it's more expensive to put someone to death than to put someone away for life.

Controversial execution in Ohio uses new drug combination - CNN.com
 in the beginning, humans didn't wipe after they pooped. just
 because something went on in the past doesn't mean it should
 continue. You could use the same argument for slavery and war.

If the firing squad worked great the executioners wouldn't need a
 blank to convince themselves that it wasn't their bullet that killed the
 prisoner.

22 ^ | 4 v • Reply • Share >



Help_Me_Obi_Wan → James • a month ago

It may or may not deter crime, who knows? But there is a 100%
 certainty that someone who has been executed will NEVER
 commit another crime.

27 ^ | 2 v • Reply • Share >



James → Help_Me_Obi_Wan • a month ago

Can't the same be said for people in prison for life?

8 ^ | 7 v • Reply • Share >



Help_Me_Obi_Wan → James • a month ago

NO! Prisoner on prisoner violence or prisoner on correction officer
 violence, up to and including more killing. I'm not sure you have
 heard, but sometimes prisoners escape. I don't think most of the
 ones that escape spend the rest of their lives reading the Bible and
 helping old ladies cross the street.

17 ^ | 2 v • Reply • Share >



James → Help_Me_Obi_Wan • a month ago

I'm not sure if you've heard, but very few prisoners escape, and it's
 up to the law enforcement community to stop it from happening.

Also, almost all fugitive prisoners have less than a few days before
 they get caught and a whole lifetime to read the bible.

10 ^ | 3 v • Reply • Share >



Help_Me_Obi_Wan → James • a month ago

So, in the few days before they get caught, they are model citizens.
 Man, I would love to know what kind of drugs you're taking.

7 ^ | 1 v • Reply • Share >



James → Help_Me_Obi_Wan • a month ago

Nope, they aren't, and no one said they were.

4 ^ | 1 v • Reply • Share >



zipper → Help_Me_Obi_Wan • 13 days ago

obviously no substances that promote clear thinking!

^ | v • Reply • Share >



Larry Wilson → James • 23 days ago

The problem being that some of those that DID escape have killed
 others while on the run. Recent case here in Arizona, they killed
 while running!

2 ^ | v • Reply • Share >



James → Larry Wilson • 23 days ago

Don't let them escape. What were violent offenders doing in a
 medium security prison?

^ | 1 v • Reply • Share >



zipper → James • 13 days ago

"don't let them escape." -man, you sound like a juvenile!!
 ask your mama to change your diaper, and go watch the Cartoon
 Network instead of posting your dribble here!



zipper → James • 13 days ago

maybe YOU haven't heard about all the convicts that get released due to "good behavior," or "overcrowding." many commit crimes within days, sometimes hours, of release. rape and murder are very common instances.

why are you so pro-criminal, James? i don't hear a word from you in sympathy for their victims.

1 ▲ | 1 ▼ • Reply • Share ›



Sally Frederick-Tudor → James • a month ago

Hell NO! Save taxpayers money by execution and not housing and feeding them for years is a lot cheaper, no doubt about that!!

5 ▲ | 1 ▼ • Reply • Share ›



blurp → Sally Frederick-Tudor • a month ago

States without the death penalty have lower murder rates than the ones with the death penalty (source: deathpenalty <dot>.org), and it cost approximately 3 times as much to execute a person as it does to house them in a single cell for 40 years (Source: Dallas Daily News)</dot>

7 ▲ | 1 ▼ • Reply • Share ›



maineiac123 → blurp • a month ago

My goodness, are you nuts? To talk about facts instead of beliefs?

5 ▲ | 1 ▼ • Reply • Share ›



Kim Kacer → maineiac123 • 24 days ago

lol

▲ | ▼ • Reply • Share ›



Why → blurp • 6 days ago

A recent study in Canada showed that putting salt on the roads reduced accidents. Eager to get on the joy train, Texas put lots of salt on the roads and nothing happened.

Understand WHAT statistics mean, not just quote them.

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zipper → blurp • 13 days ago

really? now why do you suppose that is? it is not logical.

▲ | ▼ • Reply • Share ›



James → Sally Frederick-Tudor • a month ago

It costs more money to execute them. How intellectually lazy can people be nowadays?

5 ▲ | 1 ▼ • Reply • Share ›



Help_Me_Obi_Wan → James • a month ago

It costs very little to execute someone. The cost are the lawyer's fees for appeal after appeal after appeal after appeal after appeal...are you starting to understand how it works?

3 ▲ | 1 ▼ • Reply • Share ›



maineiac123 → Help_Me_Obi_Wan • a month ago

And those appeals are a part of the due process and must be figured into the cost. Are you starting to understand how due process works? Most likely not.

2 ▲ | 1 ▼ • Reply • Share ›



Help_Me_Obi_Wan → maineiac123 • a month ago

There is due process and complete idiocy. When you become the

Controversial execution in Ohio uses new drug combination - CNN.com
 vicini, maybe your views will change. my guess you are someone
 who is a lawyer (not likely) or someone who has spent there lives
 on the wrong side of the justice system.

2 ^ | v • Reply • Share >



zipper → Help_Me_Obi_Wan • 13 days ago

he is right in that, at the present time, that is the law; and that's the Entire problem.....the law needs changing. eliminate automatic appeals; that is absurdity! execution of sentence needs to be carried out swiftly, barring solid grounds for appeal. will be a deterrent and will reverse the insane cost profile presently in effect.

^ | v • Reply • Share >



maineiac123 → zipper • 13 days ago

Sure eliminate automatic appeals and kill quickly right? The fact that you most likely will kill an innocent person now and then doesn't matter does it? All you have to do is look at the number of people who's convictions have been overturned for a number of reasons including the fact they were innocent to start with to see the problem with the limitation of appeals. Nope, like so many others posting here you're simply bloodthirsty. I'm sure though that you have no problems telling a woman what to do with her body when it comes to abortion.

^ | 1 v • Reply • Share >



maineiac123 → Help_Me_Obi_Wan • a month ago

You quite obviously have no idea what due process is as you keep demonstrating. No more posts from me to you because I prefer to comment to those who are sufficiently intelligent to understand.

^ | v • Reply • Share >



CTed → maineiac123 • 24 days ago

They don't need to be. Due process is served by conviction by a jury and 1 appeal.

^ | v • Reply • Share >



Larry Wilson → Help_Me_Obi_Wan • 23 days ago

are you saying these lawyer's are not doing this for free? I guess they just want more tax payers to pay for their crimes too.

^ | v • Reply • Share >



DoctorFeelgoodMD → James • a month ago

You look like an ex-con.

2 ^ | 2 v • Reply • Share >



Dillon → DoctorFeelgoodMD • a month ago

and you sound like a very very shallow person...

2 ^ | v • Reply • Share >



DoctorFeelgoodMD → Dillon • a month ago

No one is talking to you so mind your own business please. Amazes me how people defend mass murderers and have no regard for victims of his horrendous crimes.

1 ^ | 2 v • Reply • Share >



Larry Wilson → DoctorFeelgoodMD • 23 days ago

Too many think that when the victim has been killed, they don't have rights anymore. So they let the criminals have all the right the victim used to have then. It like when A vampire sucks all the blood from their victims. My problem is just one.....A killer has no rights except to die when he's executed.....he can take his time or die quickly. That is up to him.....he has that right only!

1 ^ | v • Reply • Share >

**Kim Kacer** → DoctorFeelgoodMD • 24 days ago

Obviously, you're not an MD... advice is how that should be spelled, Anyone w/ an MD would know that.

1 ^ | 2 v • Reply • Share >

**Kim Kacer** → James • 24 days ago

Ummmm... by chance have you heard of the "Tea Party"?

^ | 3 v • Reply • Share >

**zipper** → Kim Kacer • 13 days ago

@ Kim Kacer--- Really! you're implying that any member of any Tea Party is intellectually deficient?

1 ^ | v • Reply • Share >

**infadelicious** → zipper • 13 days ago

Kim has read Alinsky's rules for radicals. No argument or defence for your own stupidity? Deflection.

1 ^ | v • Reply • Share >

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EXHIBIT F

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Ohio governor delays planned execution using two-drug method

Fri, Feb 7 2014

By Kim Palmer

CLEVELAND (Reuters) - Ohio on Friday delayed its next scheduled execution to complete a review of a new two-drug combination that left a condemned inmate convulsing and appearing to struggle for breath for several minutes as he was put to death in January.

Gregory Lott, 52, had been scheduled to die March 19 by a lethal injection of the same combination of the sedative midazolam and the pain killer hydromorphone that Ohio had used in the January execution.

Ohio Governor John Kasich delayed Lott's execution date to November to give the state prison department time to complete a review of that execution, spokesman Rob Nichols said.

Lott was convicted and sentenced to death for the killing of John McGrath, 82, who was set on fire in 1986.

Ohio and other states that have the death penalty have increasingly been forced to look for alternate drugs and sources of drugs for executions as pharmaceutical companies have raised objections to their products being used in capital punishment.

Ohio turned to the two-drug combination to execute Dennis McGuire in mid-January. Witnesses said McGuire appeared to be gasping for breath before he died. It was the first time the combination had been used to execute an inmate in the United States.

McGuire's children, who witnessed the execution, have sued Ohio, alleging the state violated his Constitutional right for protection against cruel and unusual punishment.

The delay in Lott's execution came days after a federal judge ordered Louisiana to delay by at least 90 days the execution of inmate Christopher Sepulvado.

Louisiana had also planned to use a combination of midazolam and hydromorphone to execute Sepulvado, who was convicted of killing his 6-year-old stepson.

(Reporting by Kim Palmer in Cleveland; Editing by [David Bailey](#), Eric M. Johnson and [Ken Wills](#))

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EXHIBIT G

Louisiana execution postponed to study lethal drugs

Rick Jervis, USA TODAY [\(/staff/1130/rick-jervis\)](http://staff/1130/rick-jervis) 8:26 p.m. EST February 3, 2014



(Photo: Kichiro Sato, AP)

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The execution of a Louisiana man scheduled for this week has been postponed for three months while attorneys on both sides grapple with what combination of lethal drugs will lead to his death.

After meeting with a federal judge in Baton Rouge on Monday, attorneys for both sides agreed that the lethal-injection execution of Christopher Sepulvado, scheduled for Wednesday, should be delayed to further review the drug protocol.

The delay is the latest in a nationwide series of controversies and legal disputes over a shortage of lethal injection drugs. Prisons have had to reformulate their lethal drug recipes after European drugmakers stopped shipping barbiturates and sedatives used in executions, raising a constitutional question of inmates' right to be free of cruel and unusual punishment.

A hearing on the constitutionality of Louisiana's proposed new protocol — a mixture of midazolam, a sedative, and hydromorphone, a painkiller — is scheduled for April 7, where lawyers for the inmate will present pharmacologists and other experts to challenge the state's lethal cocktail, said Gary Clements, a lawyer for Sepulvado.

"We have severe questions," Clements said. "We want to make sure they're giving us all the information they have."

Sepulvado, 70, was convicted of the 1992 murder of his 6-year-old stepson in Mansfield, La. Prosecutors said he beat the boy and stabbed him with a screwdriver before dunking him in a scalding hot bath.

In a statement issued Monday, officials of the Louisiana Department of Public Safety and Corrections said, "The Department has been committed throughout the entire process to following the court's direction and carrying out the sentence humanely and in accordance with the law."

Other states are facing similar challenges. The family of an Ohio inmate executed last month is suing the state and a drug company, claiming Dennis McGuire was a victim of "cruel and unusual punishment" when he appeared to "writhe in pain" for 26 minutes before succumbing to the injected drugs. McGuire was injected with a similar mixture of midazolam and hydromorphone.

And the Georgia Supreme Court is reviewing a case of a death row inmate who is challenging a state law shielding the identity and methods of companies that make the state's lethal injection drugs.

The new combinations of drugs raise questions of inmates' rights to know what drugs will lead to their deaths and avoid "cruel and unusual punishment," said Richard Dieter, executive director of the Death Penalty Information Center, a Washington, D.C., organization that opposes the death penalty. But prisons are being guarded with that information so as to not scare away more drugmakers, he said.

"Citizens, even convicted inmates, have an elementary right to know what's being done to them," Dieter said. "You have a right to humane treatment."

For the past 30 years, U.S. prison officials used mostly sodium thiopental to carry out more than 1,000 lethal-injection executions, he said. But in 2011, U.S. manufacturer Hospira stopped making the drug, citing complaints from officials in Italy, where the drug was made, that it was being used in capital punishment. Most prisons switched to pentobarbital until its Danish maker, Lundbeck, restricted its sale for executions, Dieter said.

Louisiana ran out of its stock of pentobarbital and said last week it would switch to the midazolam-hydromorphone combination, prompting the court hearing.

As prisons' drug stocks dwindle, some states are considering reverting to previous methods, such as the electric chair or even a firing squad, said Tania Tetlow, a Tulane University Law School professor and former federal prosecutor. States switched to the more palatable lethal injection in the 1970s, but the electric chair and firing squad were never ruled unconstitutional by the Supreme Court, she said.

As more states wrestle with lethal injection legality, the high court may revisit the death penalty issue, Tetlow said. "It's an awkward conversation to have," she said. "Even people who support the death penalty don't want to talk about the means."

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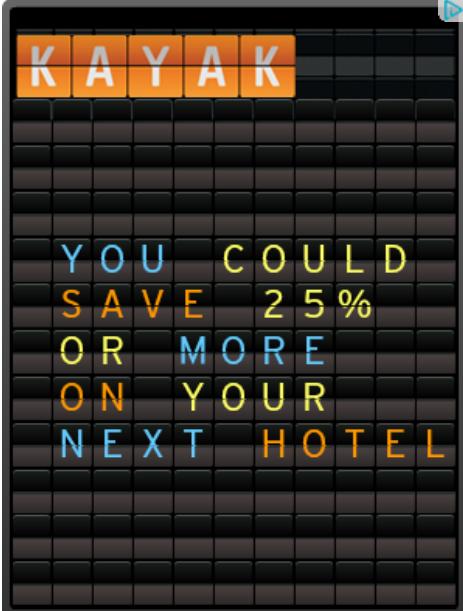
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Feb 17, 2014

EXHIBIT H

1 IN THE UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF MISSOURI
2 CENTRAL DIVISION

4 DAVID ZINK, et al.,)
5 Plaintiffs,)
6 vs.) No. 2:12-CV-4209-BP
7 GEORGE A. LOMBARDI, et al.,)
8 Defendants.)

11
12
13 DEPOSITION OF GEORGE LOMBARDI
14 TAKEN ON BEHALF OF THE PLAINTIFFS
15 JANUARY 17, 2014

	I N D E X	PAGE
1		
2		
3	EXAMINATIONS	
4	Direct Examination by Ms. Carlyle	5
5		
6		
7	EXHIBITS	
8	(PLAINTIFF'S)	
9	(1) Preparation and Administration of	19
10	Chemicals for Lethal Injection Document	
11	(2) Affidavit of George Lombardi	22
12	(3) Third Supplemental Declaration of	28
13	Dr. Larry Sasich	
14	(4) Second Supplemental Declaration of	29
15	Dr. Larry Sasich	
16	(5) Certificate of Analysis - 11/14/2013	30
17	(6) Certificate of Analysis - 12/10/2013	30
18	(7) Memorandum - Dr. Markway - 11/15/2013	37
19	(8) Report of Dr. Dorothy Lewis	38
20	(9) Lombardi's Interrogatory Responses	18
21	(10) Chronology of Execution	47
22	(11) Chemical Log - 11/20/2013	52
23	(12) Chemical Log - 12/11/2013	52
24	(EXHIBITS ATTACHED)	
25		

1 IN THE UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF MISSOURI

3 CENTRAL DIVISION

4 DAVID ZINK, et al.,)

5)

Plaintiffs,)

6)

vs.) No. 2:12-CV-4209-BP

7)

GEORGE A. LOMBARDI, et al.,)

8)

Defendants.)

9)

10 DEPOSITION OF GEORGE LOMBARDI, produced, sworn and examined
11 on January 17, 2014, between the hours of eight o'clock in the
12 forenoon and five o'clock in the afternoon of that day, at the
13 Offices of Missouri Department of Corrections, 2729 Plaza
14 Drive, Jefferson City, Missouri 65102, before Ashley C. High,
15 Registered Professional Reporter, Certified Shorthand Reporter
16 (IL) and Certified Court Reporter (MO), in a certain cause now
17 pending in the United States District Court, Western District
18 of Missouri, Central Division, between DAVID ZINK, et al.,,
19 Plaintiffs, vs. GEORGE A. LOMBARDI, et al.,, Defendants; on
20 behalf of the Plaintiffs.

21

22

23

24

25

1

A P P E A R A N C E S

2

3 FOR PLAINTIFFS BARNETT, CLAYTON L. TAYLOR AND ZINK:

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 218 of 331

1 IT IS HEREBY STIPULATED AND AGREED by
2 and between counsel for the Plaintiffs and counsel
3 for the Defendants that this deposition may be taken
4 in shorthand by Ashley C. High, a Registered
5 Professional Reporter, Certified Shorthand Reporter
6 (IL) and Certified Court Reporter (MO), and
7 afterwards transcribed into typewriting; and the
8 signature of the witness is expressly reserved.

9 (PLAINTIFF'S EXHIBITS 1 THROUGH 12 WERE MARKED FOR
10 IDENTIFICATION.)

11 * * * * *

12 GEORGE LOMBARDI,
13 of lawful age, produced, sworn and examined on
14 behalf of the Plaintiffs, deposes and says:

15 (DEPOSITION STARTED AT 1:09 P.M.)

16 DIRECT EXAMINATION

17 BY MS. CARLYLE:

18 Q. Mr. Lombardi, I know you've had your
19 deposition taken many times before.

20 A. Uh-huh.

21 Q. I don't think we've ever met in that
22 context, so let me just say to you that when I ask
23 you a question, I'm really not trying to confuse
24 you, although I may do that inadvertently. If what
25 I'm asking isn't clear, please tell me that, and

1 I'll rephrase it.

2 A. I'll do that. Thank you.

3 Q. And otherwise I'm going to, I guess
4 sort of, assume that you think you understand me.

5 A. Okay.

6 Q. Okay, thank you.

7 MR. HANSEN: Elizabeth, before we get
8 started, Sue is going to be handling the witness in
9 this. But since we talked about the issue about the
10 discovery disclosures of the documents, let's do
11 that on the record before we get-going with that.

12 MS. CARLYLE: Okay.

13 MR. HANSEN: You had sent an e-mail --
14 we had discussed in Mr. Dormire's deposition on --
15 two days ago on Wednesday the 15th, that we would
16 produce the -- reproduce the documents that we had
17 earlier produced that had been redacted with
18 number -- phone numbers and addresses and items that
19 did not relate to our assertion of state secrets or
20 the execution team members. And I told you would we
21 would provide those to you.

22 You had sent an e-mail then yesterday morning
23 on the 16th saying that you expected to have those
24 today. I was in court all day yesterday, but -- and
25 I was working on producing a set of redacted

1 numbered pages for the protocol that we worked on
2 Wednesday evening. I and the Department have not
3 had time to go through all those other documents and
4 unredact those numbers and addresses and produce
5 those here today.

6 As I told you when you arrived this afternoon,
7 we will produce those in the next ten business days,
8 I believe is what Mr. Briesacher told me. Some of
9 those documents have to be obtained again from the
10 institution in order to produce them without
11 redactions.

12 In the meantime, if you need any of those
13 phone numbers or addresses, you tell me and we will
14 get those for you immediately. I suspect that we
15 can do it within hours if you need them.

16 And so the record is clear, the only thing --
17 I believe the only thing that have been redacted are
18 personal cell phone numbers, addresses, and the
19 names themselves have not been redacted. So as the
20 records exist now you can look at those records,
21 identify who the person is, and whether or not you
22 need that address or that phone number.

23 So if you do, either today for this
24 deposition, or Monday in order to conduct some
25 investigation, whatever it is, you just let us know,

1 and we will get those as soon as we can. Certainly
2 before we produce everything else. So that's what
3 we're able to do.

4 MS. CARLYLE: Okay. Well, my response
5 to that, for the record, again is that when the
6 documents were produced, they were overdue, and now
7 they -- then they were withdrawn for almost two
8 weeks, and were even more overdue, and now they're
9 having to be reproduced in proper form.

10 It's not acceptable to wait ten days. And
11 it's not acceptable for us to have to call you when
12 we want information that's still on the documents.

13 I will confer with my co-counsel to determine
14 whether we want to bring that to the Judge's
15 attention and ask for a direct -- that that be
16 sooner or impose other sanctions.

17 So -- actually, let -- while we're still
18 talking about pieces of paper. What's the status of
19 what -- for one of a better term we're calling the
20 non-public protocols that you and I worked on the
21 other night, but there was some difficulty about the
22 page numbers?

23 MR. HANSEN: Let's make a record on
24 that --

25 MS. CARLYLE: Yes, let's do that.

1 MR. HANSEN: -- since it happened at
2 the conclusion of the deposition of Mr. Dormire.

3 MS. CARLYLE: After the conclusion
4 really.

5 MR. HANSEN: And after our court
6 reporter left.

7 MS. CARLYLE: Okay.

8 MR. HANSEN: We produced for you on
9 Wednesday morning at -- I believe you arrived at --

10 MS. CARLYLE: 11:00.

11 MR. HANSEN: -- 11 o'clock for the
12 deposition that was to begin at 1 o'clock. We
13 provided you what had we identified as three
14 different protocols that we had referenced in
15 production of documents saying -- in our response
16 said we would make those available for you,
17 attorneys eyes only, but no copies to be made,
18 because we believe that they were entitled to
19 protection under the protective order established in
20 -- I believe it was either Order 110 or 112.

21 We made those available to you, and you had an
22 opportunity to review those at that time prior to
23 the deposition, and in fact you marked two of them
24 as exhibits at the deposition and used them.

25 At the -- one of those -- they began on

1 page -- we did go ahead and Bates stamp those pages,
2 and they began Bates stamp page number 2405 and I
3 believe ended on 2687. And they consist of what we
4 have referred to as the draft Franklin execution
5 protocol, which ended up being marked as Exhibit 8,
6 I believe.

7 Then there also was the actual Franklin
8 protocol that was developed during the execution of
9 Mr. Franklin, which did not get marked as an
10 exhibit. And then there is the Nicklasson protocol
11 that I believe was marked as Exhibit 9.

12 At the conclusion of the deposition, you
13 indicated that you wanted to take with you copies of
14 portions of those protocol, and it had been our
15 position that we did not want those to leave until
16 we had -- until it was -- we agreed what we believed
17 was privileged or closed and what was not.

18 At that time, we worked it out. We sat down,
19 I think we took an hour -- ended up being like two
20 hours, I think. You looked through all those
21 protocols, you identified which pages that you
22 believed you did not have an interest in, most of it
23 related to security issues, perimeter security other
24 things. You separated those out, and you identified
25 on those three protocols -- actually, it was just

1 the two protocols --

2 MS. CARLYLE: Just the two, yes.

3 MR. HANSEN: You didn't look at Exhibit
4 8 -- you looked at the Franklin protocol, that had
5 not been marked, the actual Franklin protocol and
6 you looked at the Nicklasson protocol.

7 We removed the pages that you said you did not
8 want, that you were not interested in. And then I
9 went through them and identified the things, along
10 with Mr. Dormire, we identified the items that we
11 felt were -- needed to be protected, that related to
12 safety and security.

13 I showed you those things that we needed to
14 redact, mostly they were equipment and items that
15 were to be used by officers. We redacted those. We
16 made photocopies. As it turned out, the first set
17 of photocopies you could still see through some of
18 the permanent marker, so we had to mark them out
19 again, photocopy an additional time, and as we put
20 the final set together for you to take we realized
21 that the copier did not copy some of the Bates
22 stamps numbers at the bottom of the page. So rather
23 than take another half hour and try to recopy it,
24 we -- you went ahead and hook those pages so that
25 you could prepare for the deposition, and I told you

1 that I would go back and make sure those redactions
2 were done properly -- or accurately and on pages
3 that had the Bates stamp numbers, which we've done.
4 I spent all morning doing that.

5 I have with me now a copy of the redacted
6 pages that we agreed that you could take, and
7 excluding the pages that you identified that you did
8 not have an interest in or did not need.

9 And so the record is clear, too, I went ahead
10 on the Franklin protocol, that had been marked as
11 Exhibit 8, which was just the draft, I went ahead
12 and removed corresponding pages that ended up being
13 in the actual protocol that we ended up going
14 through, okay?

15 MS. CARLYLE: Okay.

16 MR. HANSEN: I've got that here today.
17 I'm going to give it to you right now. It's both a
18 hard copy and it's on disc.

19 MS. CARLYLE: Okay. Well, two things.
20 Well, first of all, let me kind of -- I think most
21 of what you said is accurate. I want to be clear on
22 -- make the record clear on a few of comments you
23 made.

24 First of all, I was -- at 11 o'clock on
25 Wednesday, before the 1 o'clock deposition, I was

1 given approximately 220 pages of materials to
2 review. In fact, between 11 o'clock and the time I
3 really needed to get something to eat before the
4 deposition, I was able to review the draft Franklin
5 protocol and the actual Franklin protocol. I just
6 didn't have time to review the Nicklasson
7 protocol, and I didn't. So really before the
8 deposition I did -- I mean, I knew I had the
9 Nicklasson protocol, but I never saw it.

10 After the -- after the deposition we discussed
11 -- my proposal to you was that you determine what
12 pages you thought were sensitive and present those
13 to me to see if I could do without them.

14 You told me that you could not do that until
15 today. I was not willing to wait until today to
16 have any further access to those documents, so I
17 then undertook to determine what I didn't think I
18 needed. Eventually you then went through the
19 documents again and decided that there were other
20 pages you thought were really sensitive, you showed
21 them to me, and as I recall at least the majority of
22 them I agreed that I really didn't need those either
23 and we took them out. And then you made some
24 redactions on some of them that I thought that I did
25 need.

1 But you know, the matters you wanted to
2 redact, which concerned, as I recall, key ring
3 numbers and equipment were not at that point
4 information that I thought I needed, so I certainly
5 didn't object at that point to your redacting them.

6 And then I think what you said about the
7 copying machine excitement was pretty -- was
8 accurate.

9 So I guess my position now is what I think
10 would be helpful would be a list from you of what I
11 didn't want. I certainly didn't have time to make
12 such a list at the time.

13 MR. HANSEN: I failed to state on the
14 record, which is my oversight, is that I'm going to
15 do a redaction log or a privilege log.

16 MS. CARLYLE: Okay.

17 MR. HANSEN: And I would hope to have
18 it done today, but because I was out of town in
19 court in a hearing yesterday, it was all I could do
20 to reconstruct the Bates number and produce them for
21 you here today.

22 I will get to you some time next week the
23 redaction or privileged log, which will identify not
24 only the pages that you did not receive, but it will
25 also describe the information that was redacted on

1 pages you did receive.

2 MS. CARLYLE: Okay. That's helpful.

3 And as I said, I mean in good faith, I really think
4 that's information I probably don't need, but number
5 one, I'm only one of a rather large team of lawyers.

6 And number two, the circumstances under which I
7 had to review this on Wednesday were not conducive
8 to careful considered decisions about anything, so I
9 mean it's possible that once we have that log and
10 once everybody has -- the other attorneys have taken
11 a look at the documents, you know, that we may --
12 you know, we may want to argue about that. You
13 know, I can't guarantee that we won't.

14 I guess what I'm saying is I would ask that
15 you not take what we did Wednesday night as
16 conclusive on what we're entitled, because I didn't
17 have time to make that decision.

18 MR. HANSEN: I just wanted to
19 accurately state what occurred for the record, and I
20 think we've done that.

21 MS. CARLYLE: And the other thing I
22 want to say is that I understand that you take the
23 position that these documents are covered by an
24 earlier protective order. We are treating the
25 documents as attorneys eyes only as a courtesy to

1 you at this point. We do not think there's a
2 protective order covering these documents. We think
3 the protective order that was issued covered the
4 documents that were issued then and really has no
5 real relevance to this entirely different set of
6 documents.

7 So if you want to seek a protective order
8 specifically for these documents, I suggest you do
9 so, because we don't acknowledge that the documents
10 you've provided are covered by a protective order.

11 MR. HANSEN: Let's -- we've got the
12 Director here, let's go ahead and begin the
13 deposition, because we can discuss that via phone
14 conversations or e-mails later about what we need to
15 do about that, we can do that next week, so let's go
16 ahead and start the deposition.

17 MS. BORESI: Before we start the
18 deposition I have one quick thing that want to say.
19 Plaintiff's counsel continually makes references to
20 the defendant's attorneys producing the documents
21 late.

22 It's my observation that the Request for
23 Production were filed in October after discovery had
24 closed, without leave of court, and without seeking
25 any permission from the court to shorten any time

1 for discovery.

2 In addition, the overwhelming majority of the
3 documents that were produced relate specifically to
4 the Franklin execution that occurred on
5 November 20th, 2013 and the Nicklasson execution
6 that occurred on December the 10th, 2013.

7 And so, it's hard to imagine how we could have
8 produced those documents any sooner than when they
9 were generated contemporaneously with those
10 executions. That's all I have to say.

11 MS. CARLYLE: Okay. And I guess my
12 only response to that, again for the record, is that
13 if the attorneys for the defendants believed that
14 the discovery requests, which were indeed made after
15 discovery had closed, but after also after we had
16 filed -- an amended complaint had been granted, if
17 they believed that those discovery requests were
18 improper it was incumbent upon them to make that
19 objection within the period for responding to those
20 requests for productions. And it's going to be our
21 position that since such an objection was not made
22 during that time, it was waived. Okay?

23 MS. BORESI: (Nodded head.)

24 BY MS. CARLYLE:

25 Q. Mr. Lombardi, I'm going to show you

1 what's been marked as Plaintiff's Exhibit 9, and ask
2 you can tell us what that is, please?

3 A. Yes. This is my Answers to the first
4 set of Interrogatories from -- on the David Zink
5 lawsuit.

6 MR. HANSEN: Off the record.

7 (THERE WAS AN OFF-THE RECORD DISCUSSION BETWEEN
8 COUNSEL.)

9 BY MS. CARLYLE:

10 Q. And Mr. Lombardi, when did you sign
11 those responses?

12 A. The 7th day of January 2014.

13 Q. Okay. Did you personally draft the
14 text of the responses?

15 A. No.

16 Q. When did you first see the text that
17 was drafted?

18 A. I don't recall.

19 Q. Was it before December 27th?

20 A. I don't recall.

21 Q. You have no idea when you saw it?

22 A. Ma'am, there are thousands of pieces of
23 paper that cross my desk, and I don't recall when I
24 saw that.

25 Q. Okay. Let me now show you what's been

1 marked as Plaintiff's Exhibit 1, and ask you what
2 that is, please?

3 A. It's a document concerning the
4 preparation and the distribution of chemicals for
5 legal injection.

6 Q. Is it the document that's currently in
7 use by the Department?

8 A. I have to check through and read. Yes,
9 I believe it is.

10 Q. You do believe it is? So the -- I'm
11 going to draw your attention to -- and by the way,
12 for the record, let me say that these documents are
13 a part of the production of documents that we
14 received. The numbers are -- the production of
15 documents that we received on January 10th. The
16 numbers are AG02246 through 2248.

17 Let me draw your attention to the second page,
18 which is 2247, subsection B, and ask you again is
19 this the document -- is this the protocol, for one
20 of a better word, that's currently in use?

21 A. Are you asking me about subsection B?

22 Q. Yes. I'm asking you if that's
23 currently part of the execution protocol of the
24 State of Missouri.

25 A. I'm sorry, no, it is not.

1 Q. So have you seen this document before?

2 A. I can't recall if I have or not.

3 Q. Okay. Are you involved in any way in
4 determining execution protocols?

5 A. Yes, I am.

6 Q. Okay. Before an execution protocol was
7 made public, would you see it?

8 A. Yes.

9 Q. Okay. But you don't if you've ever
10 seen this one?

11 A. I can't recall this specific
12 information.

13 Q. Okay. Now, subsection B --
14 subsection -- the way these paragraphs is numbered
15 is a little odd -- but on page 2247, subsection B,
16 discusses the use of Midazolam and Hydromorphone as
17 execution drugs.

18 A. Yes.

19 Q. On 2246, the paragraphs beginning
20 capital A discuss Pentobarbital, correct?

21 A. Correct.

22 Q. Has the Missouri Department of
23 Corrections ever conducted an execution with
24 Midazolam and Hydromorphone?

25 A. It has not.

1 Q. Are you aware whether the Missouri
2 Department of Corrections currently owns Midazolam
3 or Hydromorphone for use in an execution?

4 A. I believe we have the drug, but there
5 will be use of it in an execution.

6 Q. Why will there be no use of it in an
7 execution?

8 A. Because we have no intention to do
9 that. We have Pentobarbital that we use.

10 Q. Well, I -- the subsection B says that
11 if the Department Director -- which is you, correct?

12 A. Right.

13 Q. Determines that a sufficient quantity
14 of Pentobarbital is not available, then
15 Hydromorphone or Midazolam will be used. Are you
16 saying that --

17 A. And I'm testifying right now to tell
18 you that will not be the case. We will not use
19 those drugs.

20 Q. Okay. Specifically, you won't use them
21 in the execution of Herbert Smulls if it occurs?

22 A. That's correct.

23 Q. Okay. Were the Hydromorphone and
24 Midazolam now in the Department of Corrections's
25 possession purchased at your direction? Was it your

1 **decision to buy them?**

2 A. You know, I don't recall that. I don't
3 recall whether I did or didn't.

4 **Q. Well, who else would have?**

5 A. It would either have been myself or
6 Director Dormire.

7 **Q. So if Mr. Dormire testified on**
8 **Wednesday that it wasn't he, does it mean it was**
9 **probably you?**

10 A. It was probably me.

11 **Q. Okay. Do you know whether those drugs**
12 **are compounded drugs or ordinary approved**
13 **manufactured drugs, the ones that are now in the**
14 **Department's possession?**

15 A. I don't know the nature of those drugs.
16 To the best of my knowledge, they are not
17 compounded, but are available drugs.

18 **Q. Do you know who supplies them?**

19 A. I do not.

20 **Q. Okay. Let me show you what's been**
21 **marked as Exhibit 2, and ask you what that is,**
22 **please?**

23 A. It's my affidavit referencing the Zink
24 case.

25 **Q. An affidavit -- well, when did you sign**

1 it?

2 A. December 5, 2013.

3 Q. Okay. And in general, what's the
4 subject matter of that affidavit?

5 A. It has to do primarily with the
6 identity of members of the execution team.

7 Q. Is this a document that you drafted, or
8 was it drafted for you to review and approve?

9 A. It was drafted for me.

10 Q. In this affidavit you -- it, in fact,
11 declared certain information to be state secrets; is
12 that correct?

13 A. Correct.

14 Q. Why did you believe -- now, in the
15 Missouri Statutes there is a statute providing for
16 secrecy of the identity of members of the -- of
17 people who participate in executions, correct?

18 A. Yes.

19 Q. Okay. Why did you believe that there
20 was a state secret privilege needed in addition to
21 that statute?

22 MS. BORESI: I'll object on grounds of
23 attorney/client privileged information.

24 MS. CARLYLE: I'm asking for his
25 personal belief. I'm not asking what you --

1 MS. BORESI: And if that personal
2 belief was based on information that he received
3 from legal counsel in the context of his
4 representation, it's privileged information.

5 MS. CARLYLE: So are you directing him
6 not to answer?

7 MS. BORESI: Yes.

8 MS. CARLYLE: Okay.

9 BY MS. CARLYLE:

10 Q. **What evidence do you have that there is
11 any threat to the personal safety of individuals
12 involved in the execution team?**

13 A. There's some history in other places in
14 regard to that issue. It is a chance that I am not
15 willing to take to have our individuals who are
16 involved in this process be harassed or threatened
17 by anybody in regard to their participation in the
18 execution process.

19 Q. **But in terms of evidence that the
20 physical safety of such people has been compromised,
21 are you aware of any evidence of that?**

22 A. Well, since we've never ever let that
23 information out, we've done that purposely so that
24 that will never happen.

25 Q. **Well, isn't it true that the identity**

1 of someone who in earlier litigation was called John

2 Doe 1 was made public several years ago?

3 A. I don't recall that.

4 Q. And that there was a -- there was news
5 coverage, which I think has been referred to by your
6 counsel in pleadings in this case that identify the
7 current nurse M2?

8 A. I don't recall that.

9 Q. Okay. Do you -- are you aware that
10 either of them have been harmed physically because
11 of their participation as a -- in the execution
12 team?

13 A. I'm not aware one way or the other.

14 Q. Okay. Is it improper in your view for
15 a professional association to discipline or expel
16 members of that association who don't follow the
17 ethical guidelines of that association?

18 A. I don't have any position on that.

19 Q. Is it improper for the public to
20 express its dissatisfaction with businesses who sell
21 chemicals for legal injection?

22 A. Could you repeat that, please?

23 MS. BORESI: Objection, relevance.

24 THE WITNESS: I'm sorry?

25 MS. BORESI: I objected on grounds of

1 relevance. But you can answer, if you have an
2 opinion.

3 THE WITNESS: Would you ask me again,
4 please?

5 MS. CARLYLE: Sure.

6 BY MS. CARLYLE:

7 Q. Is it improper for the public to
8 express its dissatisfaction with businesses who sell
9 chemicals for legal injection?

10 A. I have no position on that either.

11 Q. So you think -- are you familiar with
12 First Amendment?

13 A. Somewhat.

14 Q. Okay. Do you think that it's improper
15 for members of the public to express their opinions
16 about anything they want to express their opinions
17 about?

18 MS. BORESI: I'm going to object on
19 grounds of relevance, and also that it calls
20 somewhat for a legal conclusion.

21 MS. CARLYLE: Okay.

22 MS. BORESI: It's also a vague
23 question. I'm not sure what you mean by the use of
24 the word "improper". Do you mean unlawful?

25 MS. CARLYLE: No.

1 MS. BORESI: If you can answer --

2 THE WITNESS: Well, you know --

3 MS. BORESI: If you understand the
4 question, you can answer.

5 THE WITNESS: -- members of the public
6 have the right to express their opinion, that would
7 be my answer.

8 BY MS. CARLYLE:

9 Q. Okay. In that case, is it proper in
10 your view to use a state secrets privilege to avoid
11 those expressions of opinion by not telling them who
12 they can express them to?

13 MS. BORESI: I object it calls for a
14 legal conclusion.

15 MS. CARLYLE: Are you directing him not
16 to answer?

17 MS. BORESI: He can answer, if he has
18 an opinion, but he's not an attorney.

19 THE WITNESS: I'm not a lawyer, I don't
20 know the answer to that question.

21 BY MS. CARLYLE:

22 Q. Now you say in your affidavit -- let me
23 see if I can find it here -- on pages 3 and 4, you
24 say that you do not -- you do not plan to use
25 chemicals to -- for executions that are not pure,

1 potent and sterile. Do you see what I'm looking at?

2 A. Yes.

3 Q. Are you aware of the expert affidavit
4 of Dr. Larry Sasich filed in this case that the
5 chemicals used for the executions of Mr. Franklin,
6 Mr. Nicklasson and Mr. Smulls had expired before
7 those executions occurred?

8 A. No, I am not.

9 Q. Okay. Let me show you what's been
10 marked as Exhibit 3, and let me ask you if you've
11 seen that document before?

12 A. I don't know -- no, I've not seen this
13 before.

14 Q. Okay. I'll state for the record that
15 Exhibit 3 is the Third Supplemental Declaration of
16 Larry D. Sasich filed in the -- in Case Number
17 13-3699 in the 8th Circuit Court of Appeals -- and
18 I'm reading from the bottom of the document -- on
19 December 31st, 2013, which is Case Number 13-3699
20 being the -- Mr. Lombardi's mandamus action in the
21 Court of Appeals.

22 So this is a document that's been filed in a
23 case that you have pending in the Court of Appeals,
24 but you've not seen it; is that correct?

25 A. No, I haven't.

1 Q. Okay. Well, let me give you a minute
2 to take a look at it.

3 A. Okay.

4 Q. Okay. If you look at page 2 of that
5 document, the last paragraph --

6 A. Uh-huh.

7 Q. -- and actually I misspoke, because
8 this document actually doesn't say anything about
9 Mr. Smulls's execution with drugs.

10 But the last paragraph, does it not indicate
11 that the compounded drug has -- that was used for
12 Mr. Franklin had reached its beyond use date, and
13 that the one to be used for Mr. Nicklasson would
14 reach its beyond use date before he was executed?

15 MS. BORESI: And I'll object to the
16 question, the document speaks for itself.

17 THE WITNESS: I agree that the document
18 speaks for itself, yes.

19 BY MS. CARLYLE:

20 Q. Do you agree that's what it says? I'm
21 going to ask you if you understand that that's what
22 it says.

23 A. Yes.

24 Q. Okay. Let me show you what's marked as
25 Exhibit 4, and ask you if you've seen that document

1 before?

2 A. No, I haven't.

3 Q. I'll recite for the record that this
4 document was also filed on December 31st, 2013 in
5 Case Number 13-3699 in the 8th Circuit in the case
6 in which Mr. Lombardi is a petitioner for mandamus.

7 And let me ask you then since you haven't seen
8 it before to read over it, please.

9 A. Okay.

10 Q. Let me now also hand you what has been
11 marked as Exhibits 5 and 6. And I will state for
12 the record that Exhibit 5 is a page from discovery
13 that was produced on January 10th, numbered AG01266.

14 Exhibit 6 is another page from that same set of
15 discovery produced on January 10th, AG02059. Have
16 you seen these before?

17 A. No.

18 Q. Okay. Let me call -- let me ask you to
19 take a look at Exhibit 5. The -- well, first of
20 all, will you tell us for the record just by heading
21 and title what this appears to be?

22 A. 5 says Certificate of Analysis.

23 Q. And what's the product that's being
24 analyzed? I think it's in the upper left-hand
25 corner.

1 A. 1.5794 gm USED.

2 Q. **In the upper left-hand corner.**

3 A. Oh.

4 MS. BORESI: I'm going to object again,
5 the document speaks for itself.

6 MS. CARLYLE: I'm just trying to get on
7 the record what he's looking at, so that when
8 someone is talking about this later we'll know we're
9 all talking about the same thing.

10 MS. BORESI: But you have it marked as
11 an exhibit, which will be attached to the
12 deposition, so since you've referred to the document
13 exhibit number --

14 MS. CARLYLE: Well, humor me.

15 BY MS. CARLYLE:

16 Q. **What's being analyzed on this document?**

17 A. Pentobarbital sodium USP CII it looks
18 like.

19 Q. **Okay. And similarly, Exhibit 6, what**
20 **is that?**

21 A. That's a Certificate of Analysis.

22 Q. **And what's the description of this --**
23 **of the --**

24 A. S-Pentobarbital Sodium 50mg/mL Inj Sol.

25 Q. **Okay. Let me ask you to look at the**

1 **last line of exhibit -- the last two lines of**
2 **Exhibit 5, and just so we'll all be clear, please**
3 **read them aloud for me.**

4 A. At the very bottom of the page?

5 **Q. **Yep.****

6 A. "The above test results have been
7 obtained by our supplier or in our quantity
8 controlled laboratory. This analysis is not to be
9 construed as a warranty expressed or implied."

10 **Q. **Okay. And at the bottom of -- the line****
11 **at the bottom of Exhibit 6, just above where it says**
12 **page 1 of 2, on the lower left-hand corner.**

13 A. I can't read. I'm sorry, I would need
14 glasses.

15 **Q. **Okay.****

16 A. I can't read it.

17 MS. CARLYLE: Well, can we agree, those
18 of us who can read it, that it says: Results above
19 relate only to the sample that was tested? Because
20 I want Mr. Lombardi to know that that's what it
21 says.

22 MS. BORESI: Sure.

23 MS. CARLYLE: Okay. And he says he
24 can't read, so we can't rely on his being able to do
25 that. And believe me, I understand the problem,

1 but --

2 THE WITNESS: Okay.

3 BY MS. CARLYLE:

4 Q. Okay. Having looked at those four
5 documents, the two declarations of Dr. Sasich and
6 these two analyses, are you confident that -- are
7 you nonetheless confident that the drugs that have
8 been used in the last two executions and the one
9 that will be used in the upcoming execution are
10 pure, potent and sterile?

11 A. I do.

12 Q. Okay. Why is that?

13 A. Because the lab tested it, and I feel
14 very comfortable about that. I don't know who this
15 is. I don't know anything about him. He doesn't
16 mean anything to me.

17 Q. Well, have you obtained -- well,
18 actually I could show you his curriculum vitae as a
19 doctor of pharmacy for a long time.

20 A. I am comfortable that the analysis that
21 was done by the lab meets the criteria that we are
22 concerned about potency and so forth.

23 Q. Okay. In particular Exhibit 6 says by
24 its terms that the results relate only to the sample
25 that was tested. Of course, the sample that was

1 **tested was not used for the execution, was it?**

2 A. The sample that was tested -- it came
3 from the batch that --

4 Q. **Well, maybe it did and maybe it didn't.**

5 **We can't tell from this document, but certainly the**
6 **sample that was tested was not used, was it?**

7 A. I would say again that the
8 understanding I had is that it was a sample from the
9 batch that we are using.

10 MS. BORESI: And Elizabeth, excuse me,
11 I should have gone back a few questions when we
12 started talking about the testing results for this
13 particular batch of chemicals, we'd ask that it be
14 placed in the confidential section of the
15 deposition.

16 MS. CARLYLE: The Certificate of
17 Analysis?

18 MS. BORESI: Yes.

19 MS. CARLYLE: The Certificate of
20 Analysis has been provided in five different
21 Sunshine Law --

22 MS. BORESI: That's fine.

23 MS. CARLYLE: -- releases.

24 MS. BORESI: That's what we're asking,
25 and you can object if you want, but that's what

1 we're asking.

2 MS. CARLYLE: Okay. So you want the
3 exhibit to be confidential is what you're saying?

4 MS. BORESI: And the testimony -- the
5 relevant testimony.

6 MS. CARLYLE: Well, that's going to be
7 little -- well, we can try.

8 MS. BORESI: Okay.

9 MR. SPILLANE: If I could speak. I was
10 concerned that we might be getting into information
11 in an answer that might reveal that lab. That's my
12 concern, and so --

13 MS. CARLYLE: This is really all I'm
14 going to ask him. I'm not going to ask him anything
15 that leads -- that tries to lead. I'm asking him
16 simply to talk about the results of the analysis.

17 And I mean, if you want that to be
18 confidential, I guess it can be, but I'm really not
19 going to do that. So you want the -- the --

20 MR. SPILLANE: (Nodded head.)

21 MS. CARLYLE: No, okay.

22 BY MS. CARLYLE:

23 Q. **To your knowledge, does the Department**
24 **of Corrections supply the lab with product to be**
25 **tested, or does the pharmacy do that?**

1 A. The pharmacy does that.

2 Q. Okay. So the material that is supplied
3 to the Department of Corrections is clearly not the
4 same exact chemical that was supplied to the lab,
5 because the lab has that, true? Does that make
6 sense, because it's compound --

7 A. No, doesn't make sense.

8 Q. Okay. Well, if I'm a pharmacy and I
9 make 10 grams plus 30 milliliters of Pentobarbital,
10 and I give 30 milliliter to the lab so they can test
11 it, and I give the other 10 grams to the Department
12 of Corrections, because Mr. Dormire says what he
13 gets is 10 grams, not 10 grams plus testing
14 quantity, then what the lab tests is not what the
15 Department gets, correct?

16 MS. BORESI: I object, it's asking him
17 to make a conclusion as to how the chemicals are
18 prepared and how the chemicals are divided, and I
19 don't know that he has the personal knowledge to
20 make that conclusion.

21 MS. CARLYLE: Well, he's already
22 told us that the lab gets -- that the pharmacy sends
23 the drugs to the lab to test, so he clearly knows
24 that.

25

1 BY MS. CARLYLE:

2 Q. So all I'm asking for, I guess, is a
3 common sense conclusion that if you send something
4 to someone to test -- I mean, do you think they got
5 it back?

6 A. I have no idea.

7 Q. Okay. And do you that a Certificate of
8 Analysis that says: This analysis is not to be
9 construed as a warranty, expressed or implied, is
10 something you nonetheless rely on?

11 A. What was the last part of your
12 question?

13 Q. Do you think that an analysis like No.
14 5, which says: This analysis is not to be construed
15 as a warranty, expressed or implied, is nonetheless
16 an analysis that you're willing to rely on?

17 A. Yes, it is.

18 Q. Okay. If you learned that, in fact,
19 the chemicals that are being supplied to the
20 Department of Corrections are not pure, potent and
21 sterile, would you direct that they not be used?

22 A. Yes.

23 Q. I'm going to show you what's been
24 marked as Exhibit 7, and ask you if you can tell us
25 what that is, please?

1 A. Yes.

2 Q. **What is it?**

3 A. It's a memorandum to me from Dr. Greg
4 Markway, our chief psychologist, about
5 Mr. Franklin's understanding of the upcoming
6 execution.

7 Q. **Okay. Now, Dr. Markway recites in this**
8 **memorandum that he has reviewed documentation**
9 **provided by Jessica Sutton relating to**
10 **Mr. Franklin's competency, correct?**

11 A. Yes.

12 Q. **Did you yourself review that**
13 **documentation?**

14 A. I had the information with me at the
15 time, I believe.

16 Q. **Okay. Let me show you Exhibit 8.**

17 **Exhibit 8 is a -- I'm sorry, just again so we'll be**
18 **clear about this. Exhibit 7 is a document from the**
19 **discovery produced on July [sic] 9th -- January 9th**
20 **of 2014.**

21 MS. BORESI: May I have a copy?

22 MS. CARLYLE: Oh, I thought -- here it
23 is.

24 MS. BORESI: Thank you.

25 MS. CARLYLE: This is 7.

1 MS. BORESI: Oh, I'm sorry, I thought
2 said 8.

3 MS. CARLYLE: I skipped back to 7,
4 because I realized I hadn't identified it.

5 MS. BORESI: Gotcha.

6 MR. HANSEN: Could you provide a Bates
7 stamp number, please, for 7?

8 MS. CARLYLE: I was just about to do
9 that when she asked for it, yes. 7 is AG01177. And
10 that is from the set that was produced on
11 January 9th and received on January 10th.

12 MR. HANSEN: Let's just refer to it as
13 January 10th --

14 MS. CARLYLE: Okay.

15 MR. HANSEN: -- when we're referencing
16 the Bates stamp numbers. We can agree to that.

17 MS. CARLYLE: That's fine with me.

18 BY MS. CARLYLE:

19 Q. Now, let me give Ms. Boresi Exhibit 8.
20 Exhibit 8 is Bates stamp number AG01182, and that's
21 a portion of the material provided by Ms. Sutton, is
22 it not?

23 A. Apparently.

24 Q. Okay. Do you remember reviewing this
25 document?

1 A. I don't remember.

2 Q. Okay. It begins on 1182 and it ends on
3 1184. And let me ask you to take a look at
4 page 1184, please?

5 A. 1184?

6 Q. 1184, the last page.

7 A. Okay.

8 Q. Specifically, the paragraph that is --
9 the third paragraph from the end beginning: The
10 observations of Ms. Herndon.

11 A. Okay.

12 Q. Dr. Dorothy Lewis, the psychiatrist who
13 wrote that document, doesn't agree with Dr. Markway,
14 does she?

15 A. Apparently.

16 Q. Dr. Markway -- turning back to
17 Exhibit 7 -- says that he has found no evidence that
18 Mr. Franklin is aware of the reason for his
19 scheduled execution.

20 A. Is unaware.

21 Q. Is unaware, I'm sorry. That
22 Mr. Franklin is unaware of the reason for his
23 scheduled execution.

24 Now, as part of your duties as Director of the
25 Department of Corrections when there is a doubt

1 about an individual's competency to be executed,
2 you're directed to put some procedures into place --

3 A. Right.

4 Q. -- correct? And as a matter of fact,
5 that's what Ms. Herndon had asked you to do and --
6 or Ms. Sutton and Ms. Herndon had asked you to do in
7 their letter?

8 A. And that's why I relied on Dr. Markway,
9 my chief psychologist, to take a look at all the
10 material and make a recommendation to me, which he
11 did.

12 Q. Okay. Well, what Dr. Markway said was
13 that he found no evidence that Mr. Franklin is aware
14 -- unaware of the reason for his scheduled
15 execution. Do you believe that to be the complete
16 standard for competency?

17 A. And he says also in here that he's
18 aware of his scheduled execution, that he wants to
19 live, and the reason for participating in the appeal
20 process, which to me is further information that
21 seems to indicate that he knows what's going on.

22 Q. Okay. Are you familiar with the
23 section -- Missouri Statute Section 552.060.1, which
24 says that no person condemned to death shall be
25 executed if as a result of mental disease or defect

1 he lacks capacity to understand the nature and
2 purpose of the punishment about to be imposed upon
3 him or matters of extenuation, arguments for
4 executive clemency or reasons why the sentence
5 should not be carried out. Does that sound
6 familiar?

7 A. Yes.

8 Q. Okay. Do you believe that Dr.
9 Markway's recommendation to you encompasses all
10 those elements?

11 A. Yes, I do.

12 Q. Who made the final decision to use
13 Pentobarbital for Missouri executions?

14 A. I did.

15 Q. Was that chemical under consideration
16 before the Governor's statement withdrawing the
17 Propofol protocol?

18 A. Under consideration?

19 Q. Uh-huh.

20 A. I don't believe it was.

21 Q. Let's go back to Exhibit 9, which is
22 your response to the Interrogatories. You were
23 asked in the first Interrogatory to describe in
24 detail the process for determining whether a person
25 or entity will be designated as a member of the

1 **execution team.**

2 **I'm looking at page 2. And your answer was:**

3 **If the person or entity performs functions or duties**
4 **as defined by the Department's execution protocol**
5 **that meet the definition of a member of the**
6 **execution team, the person or entity is designated**
7 **as such.**

8 **Do you -- who decided that the pharmacy that**
9 **supplies the Pentobarbital, the person who wrote the**
10 **prescription and the laboratory, met the definition**
11 **of members of the execution team?**

12 A. I did after consultation with legal
13 counsel.

14 Q. **Okay. Was the pharmacy that provided**
15 **Propofol --**

16 THE WITNESS: Just a minute. They're
17 discussing.

18 MS. CARLYLE: I'm sorry.

19 (THERE WAS A PAUSE IN THE PROCEEDINGS.)

20 MS. BORESI: We can go on the record.

21 A point of clarification, the testing laboratory has
22 not been designated as a member of the execution
23 team, the prescribing doctor and the compounding
24 pharmacy has been.

25 MS. CARLYLE: Okay.

1 BY MS. CARLYLE:

2 Q. Was the pharmacy which provided
3 Propofol a member of the execution team?

4 A. I'm sorry?

5 Q. The pharmacy which provided the
6 Propofol --

7 A. No.

8 Q. Okay. Was the pharmacy that provided
9 Thiopental, Pancuronium bromide --

10 A. No.

11 Q. No, okay. Now, the statutory
12 definition of execution team hasn't changed, has it?

13 A. Not that I'm aware of.

14 Q. So why was it that you made a change in
15 designation to include suppliers that you had never
16 previously done?

17 A. Because we believed that this was the
18 method by which we would be able to get an execution
19 drug, and so therefore those who were involved with
20 this, we felt like had to be part of the team.

21 If they weren't then -- and that their
22 knowledge would -- became obvious as to who they
23 were, it would, in fact, impede the ability for us
24 to carry out the statutory mandate of executions.

25 Q. Okay. Now, when you were talking about

1 that you used the word "we", and I'm not sure if
2 that was the imperial we, or if there were other
3 people involved. If there were, who were they?

4 A. Well, obviously when we make moves like
5 this we take under consideration legal counsel, but
6 I make the final decision.

7 Q. Okay. But besides you and legal
8 counsel, was there anyone else that you consulted
9 with about that issue?

10 A. No.

11 Q. Has the Department of Corrections
12 consulted with the Missouri Department of Pharmacy
13 about the legality of the method for obtaining drugs
14 and the drugs used?

15 A. The Department of Corrections has not.

16 Q. Is the pharmacy from which the
17 Pentobarbital is obtained registered as a
18 clearinghouse with the Food and Drug Administration?

19 A. A clearinghouse?

20 Q. Uh-huh.

21 A. I don't know that.

22 Q. Has the Department of Corrections had
23 any contact with the FDA, which is the Food and Drug
24 Administration, the Drug Enforcement Administration,
25 or DEA or any other federal authorities about the

1 **legality of the execution method, or the method of**
2 **the use of those drugs?**

3 A. No.

4 Q. A couple of kind of -- sort of
5 **ministerial questions. One of the things we've**
6 **noticed in the designations or pseudonyms applied to**
7 **people is that there appears not to be an M4. Do**
8 **you know who is or was M4?**

9 A. I don't recall.

10 Q. **Okay. What's Mr. Briesacher's title?**

11 A. Chief Counsel for the Missouri
12 Department of Corrections.

13 Q. **And to whom does he report?**

14 A. Me.

15 Q. **Okay. Were you involved in any**
16 **discussions about whether or not the lab, pharmacy**
17 **and prescriber needed separate counsel in this case?**

18 A. No.

19 Q. **Who would make that decision?**

20 A. About whether they would?

21 Q. **Whether they would be represented by**
22 **the Attorney General, or whether they should have**
23 **separate counsel.**

24 A. It's under advice of counsel.

25 Q. **And the counsel are the Attorney**

1 **General's Office?**

2 A. I don't know that. I don't know. I
3 don't know where -- as I said before, I don't know
4 where that decision was made, if at all.

5 **Q. Okay. Obviously then, it's not your**
6 **decision?**

7 A. I did not make the decision.

8 **Q. Okay.**

9 MS. CARLYLE: Can we go off the record
10 for a minute?

11 (THERE WAS AN OFF-THE RECORD DISCUSSION BETWEEN
12 COUNSEL.)

13 BY MS. CARLYLE:

14 **Q. I've handed you what's -- Mr. Lombardi,**
15 **what's been marked as Exhibit 10, and that is**
16 **number -- that is pages from discovery actually**
17 **produced in a somewhat different form on Wednesday,**
18 **January 15th, produced in final form today,**
19 **January 17th, the page numbers are AG02653 -- 52 and**
20 **AG02653.**

21 **Let me ask you first to look at the entry at**
22 **the top of page 2652, the first page of this**
23 **exhibit, for 11:15, which directs that you or your**
24 **designee advised Terry Russell, who is the warden of**
25 **the Eastern Reception Diagnostic and Correctional**

1 Center, correct?

2 A. Yes.

3 Q. Advises him that Allen Nicklasson may
4 be escorted to the execution room if no stay is in
5 place and no legal activity is in progress to
6 prevent the execution.

7 A. Yes.

8 Q. And I know this didn't happen on
9 this -- in Mr. Nicklasson's case at 11:15, because
10 at 11:15, in fact, there was a stay in place, was
11 there not?

12 A. Yes, I believe that was so.

13 Q. Okay. In Mr. Nicklasson's case, was it
14 you, or was it a designee who actually made the
15 decision about when he would be escorted to the
16 execution chamber?

17 A. Me.

18 Q. And how did you decide that no stay was
19 in place and no legal activity was in progress to
20 prevent the execution?

21 A. As I always do, I would ask the
22 Attorney General, and the Attorney General would
23 share with me that there was nothing --

24 Q. Okay.

25 A. -- and so that being the case, then I

1 went ahead and gave the order.

2 **Q. Okay. And who specifically in the case**
3 **of Mr. Nicklasson did you speak to in the Attorney**
4 **General's Office to get that advice?**

5 A. Actually, Chief Counsel Matt Briesacher
6 spoke to Attorney General directly, and then shared
7 that with me.

8 **Q. The Attorney General, Mr. Koster?**

9 A. Yes.

10 **Q. So you actually spoke to**
11 **Mr. Briesacher, Mr. Briesacher spoke to Mr. Koster?**

12 A. Yes.

13 **Q. Were you aware at that time that**
14 **Mr. Nicklasson was escorted to the execution**
15 **chamber, that in fact there was a motion for a stay**
16 **pending -- or a request for a stay pending before**
17 **the 8th Circuit Court of Appeals that day?**

18 A. I don't recall that. I relied totally
19 on the Attorney General to tell me if there's any
20 reason why we should not order this to occur.

21 **Q. Well, I think there are two -- there**
22 **are two inquiries that are referenced in this**
23 **chronology. And the first one here is that the --**
24 **Mr. Nicklasson wouldn't be escorted to the execution**
25 **chamber if no stay is in place and no legal activity**

1 **is in progress.**

2 **Later you are asked -- you are directed to**
3 **inquire whether there's a legal reason why he can't**
4 **be executed. Do you make any distinction --**

5 A. I do not.

6 Q. **-- between those two?**

7 A. I do not.

8 Q. **Okay. So as far as you're concerned**
9 **the fact that there is a motion before a court for a**
10 **stay, even if you are aware of it, if counsel told**
11 **you that wasn't a problem, it wouldn't bother you?**

12 A. If the Attorney General, the highest
13 law enforcement man in the state, tells me that
14 there's no impediment to this execution, then I act
15 accordingly.

16 Q. **Is there a record of the time that it**
17 **was determined that Mr. Nicklasson and Mr. Franklin**
18 **should be escorted to the execution room?**

19 A. I believe there is.

20 Q. **Okay.**

21 MS. CARLYLE: And because I don't think
22 I have it, and I'm wondering what it is, and whether
23 it can be produced.

24 MS. BORESI: I believe you have been
25 produced all documents with regard to the execution

1 chronology.

2 MS. CARLYLE: Okay.

3 MS. BORESI: I don't believe that there
4 is any kind of a chronological record kept in the
5 area where the director or Mr. Briesacher sit during
6 the execution --

7 THE WITNESS: Right.

8 MS. BORESI: Okay. I believe
9 chronological logs are kept in the location where
10 the inmates are.

11 BY MS. CARLYLE:

12 **Q. So you and Mr. Briesacher don't keep**
13 **chronological logs yourself?**

14 A. No.

15 **Q. Or nobody keeps them for you?**

16 A. No.

17 MS. CARLYLE: Mr. Boresi, I'm going
18 show to you what has been marked Exhibits 11 and 12,
19 because I didn't realize I was going to use them as
20 exhibits until after I got here, and I don't have
21 triplicate copies, so if you'll take a look at it
22 before I show them to Mr. Lombardi -- I want you to
23 have a chance to look at them before I show them to
24 Mr. Lombardi.

25

1 BY MS. CARLYLE:

2 Q. Mr. Lombardi, I've handed you two
3 documents, one marked Exhibit 11 and one marked
4 Exhibit 12. And if you would -- first of all, could
5 you look at the lower right-hand corner and tell me
6 the AGO number on Exhibit 11?

7 A. 722.

8 Q. Okay. And Exhibit 12?

9 A. 2023.

10 Q. Now, can you tell me -- those are two
11 different documents, but they're -- would it be fair
12 to say that they're the same form, one pertaining to
13 Mr. Nicklasson, and one pertaining to Mr. Franklin?

14 A. Correct.

15 MR. HANSEN: Which exhibit numbers are
16 we on?

17 MS. CARLYLE: We're on 11 and 12, which
18 aren't on your list.

19 MR. HANSEN: Right, that's why I'm
20 trying to make sure. And then one was 2023. And
21 what's the other one?

22 THE WITNESS: 722.

23 MR. HANSEN: Thank you.

24 BY MS. CARLYLE:

25 Q. And both of those are -- record the

1 **chemicals that were used in the execution, correct?**

2 A. Yes.

3 Q. **And both of them mention the use of a**
4 **chemical called Versed?**

5 A. Yes.

6 Q. **Do you know what that was used for?**

7 A. Yes, it's used as a sedative in
8 advance, either the offender requests it, or the
9 physician decides that it's should be used.

10 Q. **Okay. When you say "in advance", when**
11 **in advance?**

12 A. In advance of the execution process.

13 Q. **Okay. Do you know how long in advance?**

14 A. I don't remember in this particular
15 case. I don't know.

16 Q. **And you've been through other**
17 **executions --**

18 A. Yes.

19 Q. **-- correct? And were sedatives used in**
20 **previous protocols also?**

21 A. Yes.

22 Q. **Okay. So is there a variation in how**
23 **long before the execution --**

24 A. It's usually a few hours before, if a
25 person requests it in particular.

1 Q. Okay. So the -- if the sedative was
2 administered a few hours before, would it have been
3 administered by M2 and M3?

4 A. I don't recall.

5 Q. If it were administered a few hours
6 before it would not have been administered in the
7 execution chamber, it would have been administered
8 in the holding cell?

9 A. Yeah, I don't remember that. You know,
10 it would vary over the years as to when this was
11 done.

12 Q. And this time, you just don't remember
13 at all?

14 A. No.

15 Q. What provision is made for the offender
16 in the holding cell to have confidential visits with
17 attorneys or clergy?

18 A. I think they're allowed to come down
19 there up to a point -- you know, I don't know the
20 detail about that.

21 Q. I guess the operative word, though, was
22 "confidential". Ordinarily visitors in the holding
23 cell are visiting with the prisoner in the presence
24 of officers, correct?

25 A. Yes.

1 Q. Okay. So what provision, if any, is
2 there for clergy or counsel to have confidential
3 visits with a prisoner in the holding cell?

4 A. You know, I don't know that detail. I
5 leave that to my staff.

6 Q. Do you think it would be appropriate
7 for that to be able to happen?

8 A. Yes, within security reasons.

9 Q. Okay.

10 A. It would be a case by case basis,
11 depending on the security of the situation and the
12 individual.

13 Q. Okay. Now, the holding cell in Bonne
14 Terre is physically set up so that there's a barrier
15 between -- a solid barrier between the prisoner and
16 any visitor, correct?

17 A. And any what?

18 Q. And any visitor of any kind?

19 A. I believe that's so.

20 Q. Okay.

21 MS. CARLYLE: If we can take a, say,
22 five-minute break, I think I may be done, but I'd
23 like to consult with remote counsel.

24 MS. BORESI: Sure.

25 MS. CARLYLE: Okay.

1 (THERE WAS A BREAK.)

2 BY MS. CARLYLE:

3 Q. I actually have a couple more
4 questions. Back to exhibits, the last two exhibits.

5 A. 11 and 12?

6 Q. 11 and 12. I'm wondering, the drug
7 Versed is not in the execution protocol as a --
8 specifically as a chemical used, is it?

9 A. No.

10 Q. Okay. Why is it on the log?

11 A. I'm sure it's because that's the drugs
12 throughout the evening that are used.

13 Q. Okay. And according to -- can I see
14 those just for a moment? I wish I had more copies
15 of them. According to the signatures of M2 and M3,
16 do you believe that -- they acknowledge that some
17 drugs were used and some were returned or discarded?

18 A. I'm sorry?

19 Q. What that documents is that some drugs
20 were used and some were -- I think one of them says
21 returned, and the other one says discarded, or
22 something like that.

23 A. Yes.

24 Q. Okay. Are you aware that M2 and M3
25 don't personally oversee the destruction of those

1 **drugs that aren't used?**

2 A. Yes.

3 **Q. Okay. Who does?**

4 A. They're done the next day.

5 **Q. Okay. By whom?**

6 A. By staff.

7 **Q. What staff?**

8 A. I'm not sure exactly who does that.

9 **Q. Okay. Is it regular staff at ERDCC?**

10 A. I don't -- to answer, I don't know who
11 does it.

12 **Q. Okay. Is it done at ERDCC? That's
13 where the drugs are at the time --**

14 A. I believe that's so, but I can't tell
15 you unequivocally that that's the case. I do know
16 that they are destroyed.

17 **Q. And who does know?**

18 A. Probably Mr. Dormire.

19 **Q. Okay.**

20 A. Or Mr. -- the warden.

21 **Q. Mr. Russell?**

22 A. Mr. Russell.

23 **Q. Have you ever seen any documentation of
24 the actual destruction?**

25 A. No.

1 MS. CARLYLE: At this point, I would
2 pass the witness.

3 MS. BORESI: I have no questions. And
4 he would like to review and sign.

5 MR. HANSEN: While we're still on the
6 record, I need to take up the issue of the protocol
7 document production which I talked about on the
8 record at the beginning of this deposition.

9 MS. CARLYLE: Sure.

10 MR. HANSEN: Two things. During the
11 course of this deposition, I have been going through
12 those records just to insure that nothing that
13 needed to be redacted needs to be redacted, and I
14 have identified two things that need to be redacted
15 from that, which need to be done by my secretary
16 because we're doing it on the electronic copy.

17 So I'm not going to give you this today, even
18 though I said on the record earlier I was going
19 to --

20 MS. CARLYLE: I'll come with you and we
21 can do it today, and I'll --

22 MR. HANSEN: Well, we can do that if we
23 have an agreement that these are going to be
24 protected and treated as confidential documents.

25 MS. CARLYLE: By confidential documents

1 you mean what?

2 MR. HANSEN: Pursuant -- well, in the
3 same respect that they were ordered to be
4 confidential under the Court's earlier order, Order
5 112 or 110.

6 MS. CARLYLE: Okay. Let me get that
7 up.

8 MR. HANSEN: But you, after I had
9 stated that I was going to give them to you, you
10 indicated on the record that you do not believe that
11 there was any protective order in effect, and so
12 we're unwilling to provide those documents --

13 MS. CARLYLE: Okay. Let me take a look
14 at 110.

15 MR. HANSEN: Is it 110 or 112?

16 MR. SPILLANE: I think 112 may be
17 dispositive, but I think 110 is smaller and 112 is
18 more detailed.

19 MR. HANSEN: I think I actually have a
20 copy of it.

21 MS. CARLYLE: I think I do, too.
22 Right, this is the general protective order --
23 okay -- so yeah, I mean if that's the protection you
24 want, I don't have a problem with that. I thought
25 that there was something --

1 MR. SPILLANE: There is a document -- I
2 believe it's Document 101 that talks about only
3 specific pages that should be disclosed --

4 MS. CARLYLE: Right.

5 MR. SPILLANE: -- and there's a list of
6 them, I believe in Document 101. And I'm not sure
7 whether Dave is talking about Document 112 or 101.

8 MR. HANSEN: Well, we did not track
9 precisely the same page numbers and categories that
10 are contained in Order 101, so I don't want to just
11 rely on 101.

12 And there was another provision, I believe,
13 and I think you're more familiar with it than I am,
14 Mike, that said that if there were documents that we
15 believe that for safety and security purposes we
16 needed to be designated as confidential --

17 MR. SPILLANE: I believe that's 112.

18 MS. CARLYLE: That's 112.

19 MR. HANSEN: -- that we could.

20 MS. CARLYLE: And I don't have any
21 problem with using 112 to make these confidential.

22 MR. HANSEN: Okay. Well, earlier you
23 had said that you didn't believe that protected them

24 --

25 MS. CARLYLE: Okay.

1 MR. HANSEN: -- and I'm just -- I want
2 to make it clear on the record, that if the position
3 of plaintiffs is that they're not going to be
4 protected, we will not disclose them.

5 MS. CARLYLE: Okay. Hang on then. And
6 I'm sorry, I think I misspoke. You and I had had
7 discussions yesterday about what I think -- what is
8 101, which is a document that governed some other
9 documents that simply weren't these documents at
10 all, that were reviewed in camera by the Court long
11 before you became active in the case.

12 And the Court took a look at that document and
13 said: Okay, of these documents these pages are
14 relevant to the lawsuit at that time.

15 What we're saying is that document reflects
16 the Court's review a totally different set of pieces
17 of paper. But on the other hand -- and I think
18 there was specific -- you know, there was specific
19 things about that.

20 But what I was saying here is if you want to
21 designate them as confidential under 112, we will
22 treat them as confidential under 112. We don't have
23 any problem with that.

24 MR. SPILLANE: I just want to say, I
25 think the document -- when you say "completely

1 different", I think it was essentially the same
2 document, it was an earlier version of the closed
3 portion of the protocol, but the page numbers were
4 different.

5 MS. CARLYLE: Well, the problem is,
6 Mike, it was a version of the closed portion of the
7 Thiopental protocol. The page numbers -- not only
8 the page numbers, but all sorts of things were
9 different --

10 MR. SPILLANE: Right.

11 MS. CARLYLE: -- it was just a whole --
12 it was just -- and it didn't contain the materials
13 that were specific to Franklin and Nicklasson, which
14 are in these. It just wasn't the same document, and
15 I don't think it applies to this document.

16 MR. SPILLANE: I think only a small
17 portion of it dealt with a specific drug, but that's
18 my thought. But I think the page numbers are
19 different -- and I think most of the headings are
20 the same, except the specific drug stuff is
21 different, which is a tiny portion of it.

22 MS. CARLYLE: Right, but --

23 MR. HANSEN: We just have a differing
24 opinion about whether or not they were similar
25 documents --

1 MS. CARLYLE: Yeah.

2 MR. HANSEN: -- and it's a subjective
3 thing. The framework's the same, but there were
4 differences, so we can leave it at that. But as
5 long as you're committing to the protection of the
6 protocol that we're going to produce -- the protocol
7 pages that we're going to produce, and that is
8 protected as confidential under 112, then we can do
9 that.

10 MS. CARLYLE: Okay.

11 MR. HANSEN: And then what we can do
12 is, I can do this relatively quickly. Go back to my
13 office, have my secretary -- she and I will redact
14 those at least two additional pages. I have about
15 15 more I have to double check. And we can then
16 print them off and produce them on another disc and
17 give that you today.

18 MS. CARLYLE: Okay. As I said, I'm
19 perfectly willing to go with you and do that. You
20 don't have to go back over there and then come back
21 come over here with it.

22 MR. HANSEN: Yeah, that's fine. We'll
23 work out those details when we're off the record.

24 MS. CARLYLE: Okay. We can go off.

25 (THE DEPOSITION WAS CONCLUDED AT 2:41 P.M.)

1 MS. CARLYLE: Back on the record for a
2 minute here. Let me state for the record that I
3 acknowledge that the defendants have designated
4 the -- frankly, I'm a little uncomfortable referring
5 to them as non-public protocols when Mr. Dormire
6 said that was not what they were.

7 MR. HANSEN: I'm not sure what you're
8 referring to.

9 MS. CARLYLE: Well, he said in his
10 Interrogatories that there was no non-public
11 protocol. And then we showed him these documents,
12 and we said: Are they the non-public protocol, and
13 he said no.

14 MR. HANSEN: Well, I think you're -- I
15 think you're misinterpreting what he said. And I
16 don't think -- I don't think you're using the same
17 terms as he's familiar with, because --

18 MS. CARLYLE: I understand that.

19 MR. HANSEN: -- there is the public
20 protocol. And we as attorneys have continued to
21 describe the full protocol as the non-public
22 protocol, so I think there may have been failure to
23 communicate there, but I don't think there's any
24 mystery about what pages and what document we're
25 talking about.

1 MS. CARLYLE: Okay. Well, what I
2 acknowledge then that the two -- the three
3 documents, the draft, the Franklin documents, and
4 the Nicklasson's documents have been designated by
5 the defendants confidential pursuant to Document 101
6 [sic], the protective order, entered by the District
7 Judge on May 31st, 2013 and --

8 MR. HANSEN: 112.

9 MS. CARLYLE: You're right, 112. I'm
10 really glad you're here. You've been keeping me in
11 line for the last three days.

12 MR. HANSEN: Well, I'm just here to
13 help you, in addition to other things.

14 MS. CARLYLE: Right. 112, which was
15 signed on July 23rd of 2013, and we will maintain
16 those protections.

17 In the event that we believe that we need to
18 request a change, we will follow the procedures set
19 out in that order for asking the Judge to lift them,
20 but until there's an order that those protections
21 are lifted, we acknowledge that they have been
22 delivered to us as confidential documents

23 MR. HANSEN: Thank you. And just so
24 it's clear on the record that this does also apply
25 to -- because it's the same documents, basically the

1 set that we delivered to you late on Wednesday
2 evening at the conclusion of Mr. Dormire's
3 deposition.

4 MS. CARLYLE: I'm trying to remember if
5 I've done anything with them since then that's
6 inconsistent with that.

7 MR. HANSEN: I assume you've just
8 shared them with the other lawyers.

9 MS. CARLYLE: I haven't shared them
10 with anyone but other lawyers, yeah.

11 MR. HANSEN: And so, I would think that
12 that would be okay. And if you would just make sure
13 the other lawyers understand --

14 MS. CARLYLE: Certainly, yeah. As a
15 matter of fact, thinking about it, I had scanned
16 them and was -- yeah, okay.

17 MR. HANSEN: Just so it's clear on the
18 record, because they are the same documents
19 basically --

20 MS. CARLYLE: Yes, yes.

21 MR. HANSEN: -- we do have that
22 agreement that the ones that were provided --
23 because it was our agreement that they were
24 confidential on Wednesday.

25 MS. CARLYLE: To be perfectly honest,

1 Mr. Hansen, I don't think that was our agreement,
2 but I'm willing to make it now.

3 MR. HANSEN: Okay. I just wanted that
4 clear on the record. Thank you. And again, you
5 will make sure that all plaintiff's attorney of
6 record are aware of that.

7 MS. CARLYLE: Yes. The protective
8 order may say that someone had -- that we have to
9 file acknowledgments, I can't remember. If it does,
10 we will.

11 I believe the protective order, either this
12 one or a subsequent order says that we can provide
13 that information to our experts, so we may end up
14 doing that, if that's what the order say.

15 MR. SPILLANE: That's my recollection
16 as being accurate, but I don't have it memorized.

17 MR. HANSEN: We can look at the order.
18 I think we can both agree, that we'll comply with
19 it.

20 MS. CARLYLE: Right. Yeah. I'm just
21 saying that the expert part of it may not be in
22 Document 112, it may be in something subsequent.

23 MR. HANSEN: Understood.

24 MS. CARLYLE: I sort of remember that
25 we had --

1 MR. SPILLANE: I think it's 112. I
2 think we did something afterwards.

3 MS. CARLYLE: Let's see here.

4 MR. HANSEN: We can find it.

5 MS. BORESI: Do we need to be on the
6 record for this?

7 MR. HANSEN: We are on the record.

8 MS. BORESI: But I'm wondering if we
9 need to continue to be on the record.

10 MS. CARLYLE: Actually, page 7 of
11 Document 112 says that it can be provided to named
12 counsel for the parties, counsel's partners,
13 associates and support staff and outside consultants
14 and experts, any person agreed on in writing by all
15 counsel in the lawsuit, court employees, court
16 reporters and persons preparing transcripts of
17 depositions and witnesses.

18 MR. HANSEN: Is that the same order
19 that directed that we were to work together to reach
20 an agreement on confidentiality and disseminating
21 the documents? No, that related to the identity
22 of --

23 MS. CARLYLE: That's a different order.

24 MR. HANSEN: That's right. Okay.

25 We're done.

1 MS. CARLYLE: Okay. Off the record.

2 (THE DEPOSITION WAS CONCLUDED AT 2:46 P.M.)

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1 CERTIFICATE OF REPORTER

2 STATE OF MISSOURI)

) ss.

3 CITY OF ST. LOUIS)

4

5 I, Ashley C. High, a Registered Professional Reporter and
6 Certified Court Reporter (MO) do hereby certify that the
7 witness whose testimony appears in the foregoing deposition
8 was duly sworn by me; that the testimony of said witness was
9 taken by me to the best of my ability and thereafter reduced
10 to typewriting under my direction; that I am neither counsel
11 for, related to, nor employed by any of the parties to the
12 action in which this deposition was taken, and further that I
13 am not a relative or employee of any attorney or counsel
14 employed by the parties thereto, nor financially or otherwise
15 interested in the outcome of the action.

16

17

18 Certified Court Reporter for

19 The State of Missouri

20

21

22

23

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25

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Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 284 of 331

1 MIDWEST LITIGATION SERVICES

2 January 20, 2014

3 SUSAN BORESI, ESQ.

OFFICE OF THE ATTORNEY GENERAL

4 207 W. High Street

Jefferson City, MO 65101

5

6 IN RE: DAVID ZINK, et al. vs. GEORGE A. LOMBARDI,
et al.

7 Dear Ms. BORESI,

8 Please find enclosed your copies of the deposition of
9 GEORGE LOMBARDI taken on January 17, 2014 in the
above-referenced case. Also enclosed is the original
signature page and errata sheets.

10

11 Please have the witness read your copy of the
transcript, indicate any changes and/or corrections
desired on the errata sheets, and sign the signature
12 page before a notary public.

13 Please return the errata sheets and notarized
signature page to ELIZABETH UNGER CARLYLE for
14 filing prior to trial date.

15 Sincerely,

16

17 ASHLEY C. HIGH, RPR, CSR(IL), CCR(MO)

18

19 Enclosures

20

21

22

23

24

25

1 ERRATA SHEET

Witness Name: GEORGE LOMBARDI

2 Case Name: DAVID ZINK, et al. vs. GEORGE A. LOMBARDI,
et al.

3 Date Taken: JANUARY 17, 2014

4

5 Page #_____ Line #_____

6 Should read: _____

7 Reason for change: _____

8

9 Page #_____ Line #_____

10 Should read: _____

11 Reason for change: _____

12

13 Page #_____ Line #_____

14 Should read: _____

15 Reason for change: _____

16

17 Page #_____ Line #_____

18 Should read: _____

19 Reason for change: _____

20

21 Page #_____ Line #_____

22 Should read: _____

23 Reason for change: _____

24

25 Witness Signature: _____

1 STATE OF _____)

2

3 COUNTY OF _____)

4

5 I, GEORGE LOMBARDI, do hereby certify:

6 That I have read the foregoing deposition;

7 That I have made such changes in form

8 and/or substance to the within deposition as might

9 be necessary to render the same true and correct;

10 That having made such changes thereon, I

11 hereby subscribe my name to the deposition.

12 I declare under penalty of perjury that the

13 foregoing is true and correct.

14 Executed this _____ day of _____,

15 20____, at _____.

16

17

18

19

20 _____
GEORGE LOMBARDI

21

22 _____

23

NOTARY PUBLIC

24 My Commission Expires:

25

A	23:10 27:22 28:3 ability 44:23 70:9 able 8:3 13:4 32:24 44:18 55:7 above-referenc... 71:9 acceptable 8:10 8:11 access 13:16 accurate 12:21 14:8 67:16 accurately 12:2 15:19 acknowledge 16:9 56:16 64:3 65:2,21 acknowledgme... 67:9 act 50:14 action 28:20 70:12,15 active 61:11 activity 48:5,19 49:25 actual 10:7 11:5 12:13 13:5 57:24 addition 17:2 23:20 65:13 additional 11:19 63:14 address 7:22 addresses 6:18 7:4,13,18 administered 54:2,3,5,6,7 Administration 2:9 45:18,24,24 advance 53:8,10 53:11,12,13 advice 46:24 49:4 advised 47:24 Advises 48:3 affidavit 2:10 22:23,25 23:4	27:1,4,7,16,17 15:10,25 16:20 17:13 54:17 64:20 attorney/client 23:23 authorities 45:25 available 9:16,21 21:14 22:17 avoid 27:10 aware 21:1 24:21 25:9,13 28:3 applied 46:6 applies 62:15 apply 65:24 appropriate 55:6 approve 23:8 approved 22:12 approximately 13:1 area 51:5 argue 15:12 arguments 42:3 arrived 7:6 9:9 Ashley 3:14 4:17 5:4 70:5 71:17 asked 39:9 41:5,6 42:23 50:2 asking 5:25 19:21,22 23:24 23:25 34:24 35:1,15 36:16 37:2 65:19 assertion 6:19 associates 68:13 association 25:15 25:16,17 assume 6:4 66:7 attached 2:23 31:11 attention 8:15 19:11,17 attorney 4:12 27:18 46:22,25 48:22,22 49:3,6 49:8,19 50:12 67:5 70:13 71:3	21:4 23:14,19 32:25 38:15 41:15 42:8,20 48:12 50:19,24 51:3,8 55:19 56:16 57:14 believed 10:16,22 17:13,17 44:17 best 22:16 70:9 better 8:19 19:20 beyond 29:12,14 Bonne 55:13 Boresi 4:10 16:17 17:23 23:22 24:1,7 25:23,25 26:18,22 27:1,3 27:13,17 29:15 back 12:1 34:11 37:5 39:3 40:16 42:21 56:4 63:12,20,20 64:1 BAILEY 4:11 BARNETT 4:3 barrier 55:14,15 based 24:2 basically 65:25 66:19 basis 55:10 batch 34:3,9,13 Bates 10:1,2 11:21 12:3 14:20 39:6,16 39:20 began 9:25 10:2 beginning 20:19 40:9 58:8 begins 40:2 behalf 1:14 3:20 5:14 belief 23:25 24:2 believe 7:8,17 9:9 9:18,20 10:3,6 10:11 19:9,10	21:4 23:14,19 32:25 38:15 41:15 42:8,20 48:12 50:19,24 51:3,8 55:19 56:16 57:14 believed 10:16,22 17:13,17 44:17 best 22:16 70:9 better 8:19 19:20 beyond 29:12,14 Bonne 55:13 Boresi 4:10 16:17 17:23 23:22 24:1,7 25:23,25 26:18,22 27:1,3 27:13,17 29:15 back 12:1 34:11 37:5 39:3 40:16 42:21 56:4 63:12,20,20 64:1 BAILEY 4:11 BARNETT 4:3 barrier 55:14,15 based 24:2 basically 65:25 66:19 basis 55:10 batch 34:3,9,13 Bates 10:1,2 11:21 12:3 14:20 39:6,16 39:20 began 9:25 10:2 beginning 20:19 40:9 58:8 begins 40:2 behalf 1:14 3:20 5:14 belief 23:25 24:2 believe 7:8,17 9:9 9:18,20 10:3,6 10:11 19:9,10
				B B 19:18,21 20:13 20:15 21:10 back 12:1 34:11 37:5 39:3 40:16 42:21 56:4 63:12,20,20 64:1 BAILEY 4:11 BARNETT 4:3 barrier 55:14,15 based 24:2 basically 65:25 66:19 basis 55:10 batch 34:3,9,13 Bates 10:1,2 11:21 12:3 14:20 39:6,16 39:20 began 9:25 10:2 beginning 20:19 40:9 58:8 begins 40:2 behalf 1:14 3:20 5:14 belief 23:25 24:2 believe 7:8,17 9:9 9:18,20 10:3,6 10:11 19:9,10
				C C 3:14 4:1,17 5:4

70:5 71:17	48:9,13,25 49:2	51:4,9,13	43:23	contained 60:10
call 8:11 30:18	53:15 55:10,10	chronology 2:19	compromised	contemporane...
called 25:1 53:4	57:15 61:11	49:23 51:1	24:20	17:9
calling 8:19	71:9 72:2	CII 31:17	concern 35:12	context 5:22 24:3
calls 26:19 27:13	categories 60:9	Circuit 28:17	concerned 14:2	continually
camera 61:10	cause 3:16	30:5 49:17	33:22 35:10	16:19
capacity 42:1	CCR(MO) 4:17	circumstances	50:8	continue 68:9
capital 20:20	71:17	15:6	concerning 19:3	continued 64:20
careful 15:8	cell 7:18 54:8,16	City 3:14 4:5,13	CONCLUDED	controlled 32:8
Carlyle 2:4 4:4,4	54:23 55:3,13	70:3 71:4	63:25 69:2	conversations
5:17 6:12 8:4	Center 48:1	clarification	9:2,3	16:14
8:25 9:3,7,10	Central 1:2 3:2	43:21	10:12 26:20	copier 11:21
11:2 12:15,19	3:18	CLAYTON 4:3	27:14 36:17,20	copies 9:17 10:13
14:16 15:2,21	certain 3:16	clear 5:25 7:16	37:3 66:2	51:21 56:14
17:11,24 18:9	23:11	12:9,21,22 32:2	conclusive 15:16	71:8
23:24 24:5,8,9	certainly 8:1	38:18 61:2	condemned	copy 11:21 12:5
26:5,6,21,25	14:4,11 34:5	65:24 66:17	41:24	12:18 38:21
27:8,15,21	66:14	67:4	conducive 15:7	58:16 59:20
29:19 31:6,14	Certificate 2:14	clearinghouse	conduct 7:24	71:10
31:15 32:17,23	2:15 30:22	45:18,19	conducted 20:23	copying 14:7
33:3 34:16,19	31:21 34:16,19	clearly 36:3,23	confer 8:13	corner 30:25
34:23 35:2,6,13	37:7 70:1	clemency 42:4	confident 33:6,7	31:2 32:12 52:5
35:21,22 36:21	Certified 3:15,16	clergy 54:17 55:2	confidential	correct 20:20,21
37:1 38:22,25	5:5,6 70:6,18	closed 10:17	34:14 35:3,18	21:11,22 23:12
39:3,8,14,17,18	certify 70:6 73:5	16:24 17:15	54:16,22 55:2	23:13,17 28:24
43:18,25 44:1	chamber 48:16	62:2,6	58:24,25 59:4	36:15 38:10
47:9,13 50:21	49:15,25 54:7	come 54:18 58:20	60:16,21 61:21	41:4 48:1 52:14
51:2,11,17 52:1	chance 24:14	63:20,21	61:22 63:8 65:5	53:1,19 54:24
52:17,24 55:21	51:23	comfortable	65:22 66:24	55:16 73:9,13
55:25 56:2 58:1	change 44:14	33:14,20	confidentiality	Correctional
58:9,20,25 59:6	65:18 72:7,11	comments 12:22	68:20	47:25
59:13,21 60:4	72:15,19,23	Commission	confuse 5:23	corrections 3:13
60:18,20,25	changed 44:12	73:24	consideration	20:23 21:2
61:5 62:5,11,22	changes 71:11	committing 63:5	42:15,18 45:5	35:24 36:3,12
63:1,10,18,24	73:7,10	common 37:3	considered 15:8	37:20 40:25
64:1,9,18 65:1	check 19:8 63:15	communicate	consist 10:3	45:11,15,22
65:9,14 66:4,9	chemical 2:20,21	64:23	construed 32:9	46:12 71:11
66:14,20,25	36:4 42:15 53:4	competency	37:9,14	Corrections's
67:7,20,24 68:3	56:8	38:10 41:1,16	consult 55:23	21:24
68:10,23 69:1	chemicals 2:9	complaint 17:16	consultants	12:12
71:13	19:4 25:21 26:9	complete 41:15	68:13	counsel 5:2,2
carried 42:5	27:25 28:5	completely 61:25	consultation	16:19 18:8 24:3
carry 44:24	34:13 36:17,18	comply 67:18	43:12	25:6 43:13 45:5
case 21:18 22:24	37:19 53:1	compound 36:6	consulted 45:8	45:8 46:11,17
25:6 27:9 28:4	chief 38:4 41:9	compounded	45:12	46:23,24,25
28:16,19,23	46:11 49:5	22:12,17 29:11	contact 45:23	47:12 49:5
30:5,5 46:17	chronological	compounding	contain 62:12	

50:10 55:2,23 68:12,15 70:10 70:13 counsel's 68:12 COUNTY 73:3 couple 46:4 56:3 course 33:25 58:11 court 1:1 3:1,16 3:17 4:16 5:6 6:24 9:5 14:19 16:24,25 28:17 28:21,23 49:17 50:9 61:10,12 68:15,15 70:6 70:18 courtesy 15:25 Court's 59:4 61:16 coverage 25:5 covered 15:23 16:3,10 covering 16:2 co-counsel 8:13 criteria 33:21 cross 18:23 CSR(IL) 4:17 71:17 current 25:7 currently 19:6,20 19:23 21:2 curriculum 33:18	DEA 45:25 dealt 62:17 Dear 71:7 death 41:24 December 17:6 18:19 23:2 28:19 30:4 decide 48:18 decided 13:19 43:8 decides 53:9 decision 15:17 22:1 42:12 45:6 46:19 47:4,6,7 48:15 decisions 15:8 Declaration 2:11 2:13 28:15 declarations 33:5 declare 73:12 declared 23:11 defect 41:25 defendants 1:8 3:8,19 4:9 5:3 17:13 64:3 65:5 defendant's 16:20 defined 43:4 definition 43:5 43:10 44:12 delivered 65:22 66:1 Department 3:13 7:2 19:7 20:22 21:2,11,24 35:23 36:3,11 36:15 37:20 40:25 45:11,12 45:15,22 46:12 Department's 22:14 43:4 depending 55:11 deposes 5:14 deposition 1:13 3:10 5:3,15,19 6:14 7:24 9:2 8:10 65:11	10:12 11:25 12:25 13:4,8,10 16:13,16,18 31:12 34:15 58:8,11 63:25 66:3 69:2 70:7 70:12 71:8 73:6 73:8,11 depositions 68:17 describe 14:25 42:23 64:21 description 31:22 designate 61:21 designated 42:25 43:6,22 60:16 64:3 65:4 designation 44:15 designations 46:6 designee 47:24 48:14 desired 71:11 desk 18:23 destroyed 57:16 56:25 57:24 detail 42:24 54:20 55:4 detailed 59:18 details 63:23 determine 8:13 13:11,17 determined 50:17 Determines 21:13 determining 20:4 42:24 developed 10:8 Diagnostic 47:25 differences 63:4 different 9:14 16:5 34:20 47:17 52:11	61:16 62:1,4,9 62:19,21 68:23 differing 62:23 difficulty 8:21 direct 2:4 5:16 8:15 37:21 directed 41:2 50:2 68:19 directing 24:5 27:15 direction 21:25 70:10 directly 49:6 director 16:12 21:11 22:6 40:24 51:5 directs 47:23 disc 12:18 63:16 discarded 56:17 56:21 discipline 25:15 disclose 61:4 disclosed 60:3 disclosures 6:10 6:16 7:3,9 8:6 discovery 6:10 16:23 17:1,14 17:15,17 30:12 30:15 38:19 47:16 discuss 16:13 20:20 discussed 6:14 13:10 discusses 20:16 discussing 43:17 DISCUSSION 18:7 47:11 discussions 46:16 61:7 disease 41:25 dispositive 59:17 dissatisfaction 25:20 26:8 disseminating 68:20 distinction 50:4 distribution 19:4	District 1:1,1 3:1 3:1,17,17 65:6 divided 36:18 Division 1:2 3:2 3:18 doctor 33:19 43:23 document 2:9 15:23 19:3,6,19 20:1 23:7 28:11 28:18,22 29:5,8 29:16,17,25 30:4 31:5,12,16 34:5 38:18 39:25 40:13 58:7 60:1,2,6,7 61:8,12,15,25 62:2,14,15 64:24 65:5 67:22 68:11 documentation 38:8,13 57:23 documents 6:10 6:16 7:3,9 8:6 8:12 9:15 13:16 13:19 15:11,25 16:2,4,6,8,9,20 17:3,8 19:12,13 19:15 33:5 50:25 52:3,11 56:19 58:24,25 59:12 60:14 61:9,9,13 62:25 64:11 65:3,3,4 65:22,25 66:18 68:21 Doe 25:2 doing 12:4 58:16 67:14 Dormire 9:2 11:10 22:6,7 36:12 57:18 64:5 Dormire's 6:14 66:2 Dorothy 2:17 40:12
--	---	--	--	--

double 63:15	70:14	2:3	exist 7:20	71:8
doubt 40:25	employee 70:13	examined 3:10	expected 6:23	fine 34:22 39:17
Dr 2:12,13,16,17	employees 68:15	5:13	expel 25:15	63:22
28:4 33:5 38:3	enclosed 71:8,9	excitement 14:7	expert 28:3 67:21	first 11:16 12:20
38:7 40:12,13	Enclosures 71:19	excluding 12:7	experts 67:13	12:24 18:3,16
40:16 41:8,12	encompasses	excuse 34:10	68:14	26:12 30:19
42:8	42:9	executed 29:14	expired 28:6	42:23 47:21,22
draft 10:4 12:11	ended 10:3,5,19	41:1,25 50:4	Expires 73:24	49:23 52:4
13:4 18:13 65:3	12:12,13	73:14	express 25:20	five 3:12 34:20
drafted 18:17	ends 40:2	execution 2:19	26:8,15,16 27:6	five-minute
23:7,8,9	enforcement	6:20 10:4,8	27:12	55:22
draw 19:11,17	45:24 50:13	17:4,5 19:23	expressed 32:9	follow 25:16
Drive 3:14	entered 65:6	20:4,6,17,23	37:9,15	65:18
drug 21:4 29:11	entirely 16:5	21:3,5,7,21	expressions	Food 45:18,23
44:19 45:18,23	entitled 9:18	23:6 24:12,18	27:11	foregoing 70:7
45:24 56:6	15:16	25:11 29:9 33:9	expressly 5:8	73:6,13
62:17,20	entity 42:25 43:3	34:1 38:6 40:19	extenuation 42:3	forenoon 3:12
drugs 20:17	43:6	40:23 41:15,18	eyes 9:17 15:25	form 8:9 47:17
21:19 22:11,12	entry 47:21	43:1,4,6,11,22	e-mail 6:13,22	47:18 52:12
22:13,15,17	equipment 11:14	44:3,12,18 46:1	e-mails 16:14	73:7
29:9 33:7 36:23	14:3	48:4,6,16,20		forth 33:22
45:13,14 46:2	ERDCC 57:9,12	49:14,24 50:14	fact 9:23 13:2	found 40:17
56:11,17,19	errata 71:9,11,13	50:18,25 51:6	23:10 37:18	41:13
57:1,13	72:1	53:1,12,23 54:7	41:4 44:23	four 33:4
duly 70:8	escorted 48:4,15	56:7	executions 17:10	framework's
duties 40:24 43:3	49:14,24 50:18		48:10 49:15	63:3
			50:9 66:15	Franklin 10:4,7
			failed 14:13	10:9 11:4,5
			failure 64:22	12:10 13:4,5
			fair 52:11	17:4 28:5 29:12
			faith 15:3	40:18,22 41:13
			familiar 26:11	50:17 52:13
			41:22 42:6	62:13 65:3
			60:13 64:17	Franklin's 38:5
			far 50:8	38:10
			FDA 45:23	frankly 64:4
			federal 45:25	full 64:21
			feel 33:13	functions 43:3
			felt 11:11 44:20	further 13:16
			file 67:9	41:20 70:12
			filed 16:23 17:16	
			28:4,16,22 30:4	
			filings 71:14	
			final 11:20 42:12	
			45:6 47:18	
			financially 70:14	
			find 27:23 68:4	
				General's 47:1

49:4	H	honest 66:25 hook 11:24 hope 14:17 hour 10:19 11:23 hours 3:11 7:15 10:20 53:24 54:2,5 humor 31:14 Hydromorphone 20:16,24 21:3 21:15,23	individual 55:12 individuals 24:11 24:15 individual's 41:1 information 8:12 14:4,25 15:4 20:12 23:11,23 24:2,4,23 35:10 38:14 41:20 67:13	Jefferson 3:14 4:13 71:4 Jessica 38:9 John 25:1 Judge 65:7,19 Judge's 8:14 July 38:19 65:15
generated 17:9				K
George 1:7,13 2:10 3:7,10,19 5:12 71:5,8 72:1,2 73:5,20				Kansas 4:5 keep 51:12 keeping 65:10 keeps 51:15 kept 51:4,9 key 14:2 kind 12:20 46:4 51:4 55:18
getting 35:10				knew 13:8 know 5:18 7:25 14:1 15:11,12 15:13 22:2,11 22:15,18 27:2 27:20 28:12 31:8 32:20
get-going 6:11				33:14,15 36:19 45:21 46:8 47:2 47:2,3,3 48:8
give 12:17 29:1 36:10,11 39:19 58:17 59:9 63:17				53:6,13,15 54:9 54:19,19 55:4,4 57:10,15,17 61:18
given 13:1				knowledge 22:16 35:23 36:19 44:22
glad 65:10				knows 36:23 41:21
glasses 32:14				Koster 49:8,11
gm 31:1				L
go 7:3 10:1 12:1 16:12,15 42:21 43:20 47:9 63:12,19,20,24				L 4:3
going 6:3,8 12:13 12:17 14:14 17:20,25 19:11 26:18 29:21 31:4 35:6,14,14 35:19 37:23 41:21 51:17,19 58:11,17,18,23 59:9 61:3 63:6 63:7				lab 33:13,21 35:11,24 36:4,5 36:10,14,22,23 46:16
good 15:3				laboratory 32:8 43:10,21
Gotcha 39:5				lacks 42:1
governed 61:8				
Governor's 42:16				
grams 36:9,11,13 36:13				
granted 17:16				
Greg 38:3				
grounds 23:22 25:25 26:19				
guarantee 15:13				
guess 6:3 14:9 15:14 17:11 35:18 37:2 54:21				
guidelines 25:17				

large 15:5	location 51:9	12:10 18:1 19:1	Mike 60:14 62:6	58:15 65:17
Larry 2:12,13	log 2:20,21 14:15	22:21 28:10	milliliter 36:10	68:5,9
28:4,16	14:15,23 15:9	29:24 30:11	milliliters 36:9	needed 11:11,13
late 16:21 66:1	56:10	31:10 37:24	ministerial 46:5	13:3,18 14:4
law 4:4 34:21	logs 51:9,13	47:15 51:18	minute 29:1	23:20 46:17
50:13	Lombardi 1:7,13	52:3,3	43:16 47:10	58:13 60:16
lawful 5:13	2:10 3:7,10,19	marker 11:18	64:2	needs 58:13
lawsuit 18:5	5:12,18 17:25	Markway 2:16	misinterpreting 64:15	neither 70:10
61:14 68:15	18:10 30:6	38:4,7 40:13,16	Missouri 1:1 3:1	never 13:9 24:22
lawyer 27:19	32:20 47:14	41:8,12	24:24 44:15	news 25:4
lawyers 15:5	51:22,24 52:2	Markway's 42:9	Nicklasson 10:10	
66:8,10,13	71:5,8 72:1,2	material 36:2	11:6 13:6,9	
lead 35:15	73:5,20	39:21 41:10	17:5 28:6 29:13	
leads 35:15	Lombardi's 2:18	materials 13:1	48:3 49:3,14,24	
learned 37:18	28:20	41:23 42:13	50:17 52:13	
leave 10:15 16:24	long 33:19 53:13	62:12	62:13	
55:5 63:4	53:23 61:10	Matt 49:5	Nicklasson's	
left 9:6	63:5	matter 23:4 41:4	48:9,13 65:4	
left-hand 30:24	look 7:20 11:3	66:15	night 8:21 15:15	
31:2 32:12	15:11 29:2,4	matters 14:1	Nodded 17:23	
legal 19:5 24:3	30:19 31:25	42:3	35:20	
25:21 26:9,20	40:3 41:9 47:21	Ma'am 18:22	non-public 8:20	
27:14 43:12	51:21,23 52:5	mean 13:8 15:3,9	64:5,10,12,21	
45:5,7 48:5,19	59:13 61:12	22:8 26:23,24	North 4:18	
49:25 50:3	67:17	33:16 35:17	notarized 71:13	
legality 45:13	looked 10:20	37:4 59:1,23	notary 71:12	
46:1	11:4,6 33:4	meet 43:5	73:23	
Lethal 2:9	looking 28:1 31:7	meets 33:21	noticed 46:6	
letter 41:7	43:2	member 42:25	November 17:5	
let's 6:10 8:23,25	looks 31:17	43:5,22 44:3	number 6:18	
16:11,12,15	Louis 4:19 70:3	members 6:20	7:22 10:2 14:20	
39:12 42:21	lower 32:12 52:5	23:6,16 25:16	15:4,6 28:16,19	
68:3		26:15 27:5	30:5 31:13 39:7	
Lewis 2:17 40:12	M	43:11	39:20 47:16	
lift 65:19	machine 14:7	memorandum	52:6	
lifted 65:21	maintain 65:15	2:16 38:3,8	numbered 7:1	
line 32:1,10	majority 13:21	memorized 67:16	20:14 30:13	
65:11 72:5,9,13	17:2	mental 41:25	numbers 6:18	
72:17,21	man 50:13	mention 53:3	7:4,13,18 8:22	
lines 32:1	mandamus 28:20	met 5:21 43:10	11:22 12:3 14:3	
list 14:10,12	30:6	method 44:18	19:14,16 39:16	
52:18 60:5	mandate 44:24	45:13 46:1,1	47:19 52:15	
litigation 4:18	22:13	MICHAEL 4:11	60:9 62:3,7,8	
25:1 71:1	manufactured	Midazolam	62:18	
little 20:15 35:7	22:13	20:16,24 21:2	nurse 25:7	
64:4	mark 11:18	21:15,24		
live 41:19	marked 5:9 9:23	MIDWEST 4:18		
	10:5,9,11 11:5	71:1		

O	29:1,3,4,24 30:9,18 31:19 31:25 32:10,15 32:23 33:2,4,12 33:23 35:2,8,21 36:2,8 37:7,18 38:7,16 39:14 39:24 40:2,7,11 41:12,22 42:8 43:14,25 44:8 44:11,25 45:7 46:10,15 47:5,8 48:13,24 49:2 50:8,20 51:2,8 52:8 53:10,13 53:22 54:1 55:1 55:9,13,20,25 56:10,13,24 57:3,5,9,12,19 59:6,13,23 60:22,25 61:5 61:13 63:10,18 63:24 65:1 66:12,16 67:3 68:24 69:1 once 15:9,10 ones 22:13 66:22 operative 54:21 opinion 26:2 27:6,11,18 62:24 opinions 26:15 26:16 opportunity 9:22 order 7:10,24 9:19,20 15:24 16:2,3,7,10 49:1,20 59:4,4 59:11,22 60:10 65:6,19,20 67:8 67:11,12,14,17 68:18,23 ordered 59:3 Ordinarily 54:22 ordinary 22:12 original 71:9 outcome 70:15	outside 68:13 overdue 8:6,8 oversee 56:25 oversight 14:14 overwhelming 17:2 owns 21:2 o'clock 3:11,12 9:11,12 12:24 12:25 13:2	particular 33:23 34:13 53:14,25 parties 68:12 70:11,14 partners 68:12 pass 58:2 PAUSE 43:19 penalty 73:12 pending 3:17 28:23 49:16,16 Pentobarbital 20:20 21:9,14 31:17 36:9 42:13 43:9 45:17 people 23:17 24:20 45:3 46:7 perfectly 63:19 66:25 performs 43:3 perimeter 10:23 period 17:19 perjury 73:12 permanent 11:18 permission 16:25 person 7:21 41:24 42:24 43:3,6,9 53:25 68:14 personal 7:18 23:25 24:1,11 36:19 Pancuronium 44:9 paper 8:18 18:23 61:17 paragraph 29:5 29:10 40:8,9 paragraphs 20:14,19 part 19:13,23 37:11 40:24 44:20 67:21 participate 23:17 participating 41:19 participation 24:17 25:11	photocopy 11:19 physical 24:20 physically 25:10 55:14 physician 53:9 pieces 8:18 18:22 61:16 place 41:2 48:5 48:10,19 49:25 placed 34:14 places 24:13 plaintiffs 1:5,14 3:5,19,20 4:3 5:2,14 61:3 plaintiff's 2:8 5:9 16:19 18:1 19:1 67:5 plan 27:24 Plaza 3:13 pleadings 25:6 please 5:25 18:2 19:2 22:22 25:22 26:4 30:8 32:2 37:25 39:7 40:4 71:8,10,13 plus 36:9,13 point 14:3,5 16:1 43:21 54:19 58:1 portion 39:21 62:3,6,17,21 portions 10:14 position 10:15 14:9 15:23 17:21 25:18 26:10 61:2 possession 21:25 22:14 possible 15:9 potency 33:22 potent 28:1 33:10 37:20 precisely 60:9 preparation 2:9 19:4 prepare 11:25 prepared 36:18
----------	--	--	--	---

preparing 68:16	35:24	providing 23:15	reading 28:18	69:1
prescriber 46:17	production 9:15	provision 54:15	real 16:5	records 7:20,20
prescribing	16:23 19:13,14	55:1 60:12	realize 51:19	58:12
43:23	58:7	pseudonyms	realized 11:20	redact 11:14 14:2
prescription	productions	46:6	39:4	63:13
43:10	17:20	psychiatrist	really 5:23 9:4	redacted 6:17,25
presence 54:23	professional 3:15	40:12	13:3,7,20,22	7:17,19 11:15
present 13:12	5:5 25:15 70:5	psychologist 38:4	15:3 16:4 35:13	12:5 14:25
pretty 14:7	progress 48:5,19	41:9	35:18 65:10	58:13,13,14
prevent 48:6,20	50:1	public 20:7 25:2	reason 40:18,22	redacting 14:5
previous 53:20	proper 8:9 27:9	25:19 26:7,15	41:14,19 49:20	redaction 14:15
previously 44:16	properly 12:2	27:5 64:19	50:3 72:7,11,15	14:23
primarily 23:5	Propofol 42:17	71:12 73:23	72:19,23	redactions 7:11
print 63:16	43:15 44:3,6	punishment 42:2	reasons 42:4 55:8	12:1 13:24
prior 9:22 71:14	proposal 13:11	purchased 21:25	recall 13:21 14:2	reduced 70:9
prisoner 54:23	protected 11:11	pure 27:25 33:10	18:18,20,23	refer 39:12
55:3,15	58:24 60:23	37:20	20:2,11 22:2,3	referenced 9:14
privilege 14:15	61:4 63:8	purpose 42:2	25:3,8 46:9	49:22
23:20 27:10	protection 9:19	purposely 24:23	49:18 54:4	references 16:19
privileged 10:17	59:23 63:5	purposes 60:15	receive 14:24	referencing
14:23 23:23	protections	pursuant 59:2	15:1	22:23 39:15
24:4	65:16,20	65:5	received 19:14	referred 10:4
probably 15:4	protective 9:19	put 11:19 41:2	19:15 24:2	25:5 31:12
22:9,10 57:18	15:24 16:2,3,7	P.M 5:15 63:25	39:11	referring 64:4,8
problem 32:25	16:10 59:11,22	69:2	Reception 47:25	reflects 61:15
50:11 59:24	65:6 67:7,11	Q	recite 30:3	regard 24:14,17
60:21 61:23	protocol 7:1 10:5	quantity 21:13	recites 38:7	50:25
62:5	10:8,10,14 11:4	32:7 36:14	recollection	registered 3:15
procedures 41:2	11:5,6 12:10,13	question 5:23	67:15	5:4 45:17 70:5
65:18	13:5,5,7,9	26:23 27:4,20	recommendation	regular 57:9
PROCEEDIN...	19:19,23 20:6	29:16 37:12	41:10 42:9	relate 6:19 17:3
43:19	42:17 43:4 56:7	questions 34:11	reconstruct	32:19 33:24
process 24:16,18	58:6 62:3,7	46:5 56:4 58:3	14:20	related 10:23
41:20 42:24	63:6,6 64:11,12	quick 16:18	recopy 11:23	11:11 68:21
53:12	64:20,21,22	quickly 63:12	record 6:11 7:16	70:11
produce 6:16 7:4	protocols 8:20	R	8:5,23 12:9,22	relating 38:9
7:7,10 8:2	9:14 10:21,25	R 4:1	14:14 15:19	relative 70:13
14:20 63:6,7,16	11:1 20:4 53:20	reach 29:14	17:12 18:6,7	relatively 63:12
produced 3:10	64:5	68:19	19:12 28:14	releases 34:23
5:13 6:17 8:6	provide 6:21	reached 29:12	30:3,12,20 31:7	relevance 16:5
9:8 17:3,8	39:6 59:12	read 19:8 30:8	43:20 47:9,11	25:23 26:1,19
30:13,15 38:19	67:12	32:3,13,16,18	50:16 51:4	relevant 35:5
39:10 47:17,18	provided 9:13	32:24 71:10	52:25 58:6,8,18	61:14
50:23,25	16:10 34:20	72:6,10,14,18	59:10 61:2	relied 41:8 49:18
producing 6:25	38:9 39:21	72:22 73:6	63:23 64:1,2	rely 32:24 37:10
16:20	43:14 44:2,5,8		65:24 66:18	37:16 60:11
product 30:23	66:22 68:11		67:4,6 68:6,7,9	remember 39:24

40:1 53:14 54:9 54:12 66:4 67:9 67:24 remote 55:23 removed 11:7 12:12 render 73:9 repeat 25:22 rephrase 6:1 report 2:17 46:13 reporter 3:15,15 3:16 4:16 5:5,5 5:6 9:6 70:1,5,6 70:18 reporters 68:16 representation 24:4 represented 46:21 reproduce 6:16 reproduced 8:9 request 16:22 49:16 65:18 requests 17:14 17:17,20 53:8 53:25 reserved 5:8 respect 59:3 responding 17:19 response 8:4 9:15 17:12 42:22 responses 2:18 18:11,14 result 41:25 results 32:6,18 33:24 34:12 35:16 return 71:13 returned 56:17 56:21 reveal 35:11 review 9:22 13:2 13:4,6 15:7 23:8 38:12 58:4 61:16 reviewed 38:8	61:10 reviewing 39:24 right 12:17 21:12 21:17 27:6 41:3 51:7 52:19 59:22 60:4 62:10,22 65:9 65:14 67:20 68:24 right-hand 52:5 ring 14:2 room 48:4 50:18 RPR 4:17 71:17 Russell 47:24 57:21,22 <hr/> S S 4:1 safety 11:12 24:11,20 60:15 sample 32:19 33:24,25 34:2,6 34:8 sanctions 8:16 Sasich 2:12,13 28:4,16 33:5 sat 10:18 saw 13:9 18:21 18:24 saying 6:23 9:15 15:14 21:16 35:3 61:15,20 67:21 says 5:14 21:10 29:20,22 30:22 32:11,18,21,23 33:23 36:12 37:8,14 40:17 41:17,24 56:20 56:21 67:12 68:11 scanned 66:15 scheduled 40:19 40:23 41:14,18 second 2:13 19:17 secrecy 23:16	secret 23:20 secretary 58:15 63:13 secrets 6:19 23:11 27:10 section 34:14 41:23,23 security 10:23,23 11:12 55:8,11 60:15 sedative 53:7 54:1 sedatives 53:19 see 11:17 13:13 18:16 20:7 27:23 28:1 56:13 68:3 seek 16:7 seeking 16:24 seen 20:1,10 28:11,12,24 29:25 30:7,16 57:23 sanctions 8:16 Sasich 2:12,13 28:4,16 33:5 sat 10:18 saw 13:9 18:21 18:24 saying 6:23 9:15 15:14 21:16 35:3 61:15,20 67:21 says 5:14 21:10 29:20,22 30:22 32:11,18,21,23 33:23 36:12 37:8,14 40:17 41:17,24 56:20 56:21 67:12 68:11 scanned 66:15 scheduled 40:19 40:23 41:14,18 second 2:13 19:17 secrecy 23:16	shorthand 3:15 5:4,5 show 17:25 18:25 22:20 28:9 29:24 33:18 37:23 38:16 51:18,22,23 showed 11:13 13:20 64:11 sic 38:19 65:6 sign 18:10 22:25 58:4 71:11 signature 5:8 71:9,11,13 72:25 signatures 56:15 signed 65:15 similar 62:24 similarly 31:19 simply 35:16 61:9 Sincerely 71:15 sit 51:5 situation 55:11 skipped 39:3 small 62:16 smaller 59:17 Smulls 21:21 28:6 Smulls's 29:9 sodium 31:17,24 Sol 31:24 solid 55:15 somewhat 26:13 26:20 47:17 soon 8:1 set 6:25 11:16,20 16:5 18:4 30:14 39:10 55:14 61:16 65:18 66:1 share 48:23 shared 49:6 66:8 66:9 SHEET 72:1 sheets 71:9,11,13 shorten 16:25	speaks 29:16,18 31:5 specific 20:11 60:3 61:18,18 62:13,17,20 specifically 16:8 17:3 21:20 40:8 49:2 56:8 spent 12:4 SPILLANE 4:11 35:9,20 59:16 60:1,5,17 61:24 62:10,16 67:15 68:1 spoke 49:6,10,11 ss 70:2 St 4:19 70:3 staff 55:5 57:6,7 57:9 68:13 stamp 10:1,2 12:3 39:7,16,20 stamps 11:22 standard 41:16 start 16:16,17 started 5:15 6:8 34:12 state 6:19 14:13 15:19 19:24 23:11,20 27:10 28:14 30:11 50:13 64:2 70:2 70:19 73:1 stated 59:9 statement 42:16 States 1:1 3:1,17 status 8:18 statute 23:15,21 41:23 Statutes 23:15 statutory 44:11 44:24 stay 48:4,10,18 49:15,16,25 50:10 sterile 28:1 33:10 37:21 STIPULATED
--	--	---	---	--

5:1	29:2 30:19 40:3	38:24 52:23	33:19 38:15	Uh-huh 5:20
Street 4:5,12,18	41:9 45:5 51:21	65:23 67:4	49:13 50:16	29:6 42:19
71:4	55:21 58:6	thereon 73:10	54:12 57:13	45:20
stuff 62:20	59:13	thereto 70:14	61:14	unaware 40:20
subject 23:4	taken 1:14 5:3,19	thing 7:16,17	times 5:19	40:21,22 41:14
subjective 63:2	15:10 70:9,12	15:21 16:18	tiny 62:21	uncomfortable
subscribe 73:11	71:8 72:3	31:9 63:3	title 30:21 46:10	64:4
subsection 19:18	talk 35:16	things 10:24 11:9	today 6:24 7:5,23	understand 6:4
19:21 20:13,14	talked 6:9 58:7	11:13 12:19	12:16 13:15,15	15:22 27:3
20:15 21:10	talking 8:18 31:8	46:5 58:10,14	14:18,21 47:18	29:21 32:25
subsequent	31:9 34:12	61:19 62:8	58:17,21 63:17	42:1 64:18
67:12,22	44:25 60:7	65:13	told 6:20 7:6,8	66:13
substance 73:8	64:25	think 5:21 6:4	11:25 13:14	understanding
Sue 6:8	talks 60:2	10:19,20 12:20	36:22 50:10	34:8 38:5
sufficient 21:13	TAYLOR 4:3	13:17 14:6,9	top 47:22	Understood
suggest 16:8	team 6:20 15:5	15:3,20 16:1,2	totally 49:18	67:23
Sunshine 34:21	23:6 24:12	25:5 26:11,14	61:16	undertook 13:17
Supplemental	25:12 43:1,6,11	30:24 37:4,13	town 14:18	unequivocally
2:11,13 28:15	43:23 44:3,12	49:21 50:21	track 60:8	57:15
supplied 36:2,4	44:20	54:18 55:6,22	transcribed 5:7	UNGER 4:4
37:19	tell 5:25 7:13	56:20 59:16,17	transcript 71:11	71:13
supplier 32:7	18:2 21:17	59:19,21 60:13	transcripts 68:16	United 1:1 3:1,17
suppliers 44:15	30:20 34:5	61:6,7,17,25	treat 61:22	unlawful 26:24
supplies 22:18	37:24 49:19	62:1,15,16,18	treated 58:24	unredact 7:4
43:9	52:5,10 57:14	62:19 64:14,15	treating 15:24	unwilling 59:12
supply 35:24	telling 27:11	64:16,16,22,23	trial 71:14	upcoming 33:9
support 68:13	tells 50:13	66:11 67:1,18	tries 35:15	38:5
sure 12:1 26:5,23	ten 7:7 8:10	68:1,2	triplicate 51:21	upper 30:24 31:2
32:22 45:1	term 8:19	thinking 66:15	true 24:25 36:5	use 19:7,20 20:16
52:20 55:24	terms 24:19	Thiopental 44:9	73:9,13	21:3,5,6,9,18
56:11 57:8 58:9	33:24 64:17	62:7	try 11:23 35:7	21:20 26:23
60:6 64:7 66:12	Terre 55:14	third 2:11 28:15	trying 5:23 31:6	27:10,24 29:12
67:5	Terry 47:24	40:9	52:20 66:4	29:14 42:12
SUSAN 4:10	test 32:6 36:10	thought 13:12,20	turned 11:16	46:2 51:19 53:3
71:3	36:23 37:4	13:24 14:4	turning 40:16	USP 31:17
suspect 7:14	tested 32:19	38:22 39:1	two 6:15 8:7 9:23	usually 53:24
Sutton 38:9	33:13,25 34:1,2	59:24 62:18	10:19 11:1,2	<hr/> V <hr/>
39:21 41:6	34:6 35:25	thousands 18:22	12:19 15:6 32:1	vague 26:22
sworn 3:10 5:13	testified 22:7	threat 24:11	33:5,6,8 49:21	variation 53:22
70:8	testifying 21:17	threatened 24:16	49:22 50:6 52:2	vary 54:10
S-Pentobarbital	testimony 35:4,5	three 9:13 10:25	52:10 56:4	Versed 53:4 56:7
31:24	70:7,8	65:2,11	58:10,14 63:14	version 62:2,6
<hr/> T <hr/>	testing 34:12	time 7:3 9:22	65:2	view 25:14 27:10
take 10:13 11:20	36:13 43:21	10:18 11:19	typewriting 5:7	visiting 54:23
11:23 12:6	tests 36:14	13:2,6 14:11,12	70:10	visitor 55:16,18
15:15,22 24:15	text 18:14,16	14:22 15:17	<hr/> U <hr/>	visitors 54:22
	thank 6:2,6	16:25 17:22		

vitae 33:18	34:24 35:1	yesterday 6:22	30:5	31st 28:19 30:4
vs 1:6 3:6,19 71:5	39:15 52:17	6:24 14:19 61:7	15 63:15	65:7
72:2	58:5,16 59:12		15th 6:15 47:18	314 4:19
W	61:15 63:6,7,23	Z	16th 6:23	37 2:16
W 4:12 71:4	64:24 68:25	Zink 1:4 3:4,18	17 1:15 3:11 71:8	38 2:17
wait 8:10 13:15	we've 5:21 12:3	4:3 18:4 22:23	72:3	4
waived 17:22	15:20 16:11	71:5 72:2	17th 47:19	42:13 27:23
want 8:12,14	24:22,23 46:5		18 2:18	29:25
10:15 11:8	willing 13:15	1	19 2:9	47 2:19
12:21 14:11	24:15 37:16	1 2:9 5:9 9:12		5
15:12,22 16:7	63:19 67:2	12:25 19:1 25:2	2 2:10 22:21 29:4	5 2:4,14 23:2
16:18 26:16	wish 56:14	32:12	32:12 43:2	30:11,12,19,22
32:20 34:25	withdrawing	1.5794 31:1	2:12-CV-4209...	32:2 37:14
35:2,17,19	42:16	1:09 5:15	2:41 63:25	50mg/mL 31:24
51:22 59:24	withdrawn 8:7	10 2:19 36:9,11	2:46 69:2	52 2:20,21 47:19
60:10 61:1,20	witness 5:8 6:8	36:13,13 47:15	20 71:2 73:15	525-6540 4:6
61:24	25:24 26:3 27:2	10th 17:6 19:15	20th 17:5	552.060.1 41:23
wanted 10:13	27:5,19 29:17	30:13,15 39:11	2013 17:5,6 23:2	573 4:13
14:1 15:18 67:3	33:2 43:16 51:7	39:13		6
wants 41:18	52:22 58:2 70:7	101 60:2,6,7,10	2014 1:15 3:11	6 2:15 30:11,14
warden 47:24	70:8 71:10 72:1	60:11 61:8 65:5	18:12 38:20	31:19 32:11
57:20	72:25	11 2:20 9:11	71:2,8 72:3	33:23
warranty 32:9	witnesses 68:17	12:24 13:2	2023 52:9,20	6011 4:5
37:9,15	wondering 50:22	51:18 52:3,6,17	207 4:12 71:4	63101 4:19
wasn't 22:8	56:6 68:8	56:5,6	22 2:10	64113 4:5
50:11 62:14	word 19:20	11/14/2013 2:14	220 13:1	644-2191 4:19
way 19:11 20:3	26:24 45:1	11/15/2013 2:16	2246 20:19	65101 4:13 71:4
20:14 25:13	54:21	11/20/2013 2:20	2247 19:18 20:15	65102 3:14
Wednesday 6:15	work 63:23	11:00 9:10	2248 19:16	7
7:2 9:9 12:25	68:19	11:15 47:23 48:9	23rd 65:15	7 2:16 37:24
15:7,15 22:8	worked 7:1 8:20	48:10	2405 10:2	38:18,25 39:3,7
47:17 66:1,24	10:18	110 9:20 59:5,14	2652 47:22	39:9 40:17
week 14:22 16:15	working 6:25	59:15,17	2687 10:3	68:10
weeks 8:8	wouldn't 49:24	112 9:20 59:5,15	27th 18:19	7th 18:12
went 11:9,24	50:11	59:16,17 60:7	2729 3:13	711 4:18
12:9,11 13:18	writing 68:14	60:17,18,21	28 2:11	722 52:7,22
49:1	wrote 40:13 43:9	61:21,22 63:8	280-3376 4:20	751-3321 4:13
weren't 44:21		65:8,9,14 67:22	29 2:13	8
61:9	X	68:1,11		
Western 1:1 3:1	X 2:1	1182 40:2	3	
3:17		1184 40:3,4,5,6	3 2:11 27:23	8 2:17 10:5 11:4
we'll 31:8 32:2	yeah 54:9 59:23	12 2:21 5:9 51:18	28:10,15	12:11 38:16,17
38:17 63:22	63:1,22 66:10	52:4,8,17 56:5	30 2:14,15 36:9	39:2,19,20
67:18	66:14,16 67:20	56:6	36:10	8th 28:17 30:5
we're 8:3,17,19	years 25:2 54:10	12/10/2013 2:15		49:17
15:16 31:8	Yep 32:5	12/11/2013 2:21		
		13-3699 28:17,19		

800 4:20
816 4:6

9

9 2:18 10:11 18:1
42:21
9th 38:19,19
39:11

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Death Penalty

9:58 PM SUN FEBRUARY 2, 2014

After Supplying For Three Missouri Executions, Pharmacy Plans To Register In State

By [CHRIS MCDANIEL](#) (/PEOPLE/DANALINFO=NEWS.STLPUBLICRADIO.ORG+CHRIS-MCDANIEL)

An Oklahoma compounding pharmacy has supplied Missouri with the drug it's used three times to execute inmates, despite the fact that the pharmacy isn't licensed here.

Now the Apothecary Shoppe is attempting to become licensed in Missouri.

According to records obtained by St. Louis Public Radio, the Oklahoma Board of Pharmacy received a letter from the Apothecary Shoppe on Jan. 13, when the pharmacy said it was planning on registering in both Missouri and Texas.

Last summer, the Apothecary Shoppe also offered to supply Missouri to Louisiana. The <https://vpnwester.f.d.org/p/kwmu/files/201401/Danainfo=mediad.publicbroadcasting.net+Pentobarbital.jpg>



<https://vpnwester.f.d.org/p/kwmu/files/201401/Danainfo=mediad.publicbroadcasting.net+Pentobarbital.jpg>

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Credit via Flickr/Nottingham Vet School

Compounding pharmacies are not regulated by the Food and Drug Administration, like drug manufacturers are. Instead, that responsibility is left to individual state boards of pharmacy. The drugs made by compounding pharmacies also have a significantly higher failure rate than those of manufactured drugs.

The pharmacy supplying Missouri with its execution drug has been criticized for several reasons: 1) for supplying to a state where it isn't licensed; 2) for making a drug that is essentially a copy of a manufactured drug (not allowed for compounding pharmacies); and 3) for relying on a controversial testing laboratory to verify the drug's effectiveness.

Apothecary Shoppe Letter

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In a statement, the American Civil Liberties Union of Missouri said it would be a "positive step" for the Apothecary Shoppe to become licensed in Missouri.

"It would be an improvement from the legally questionable procedure of handing over a controlled substance to an individual who is not the patient or a medical professional to secretly courier the drug into Missouri," legal director Tony Rothert said. "It might allow the public to finally learn whether we can trust the quality of the drugs Missouri is using."

Missouri has pointed to an anonymous testing lab's reports to argue that the drug is potent and pure. The lab is Analytical Research Laboratories in Oklahoma City, OK; it had approved a batch of steroids for commercial use that ended up killing dozens in 2012. The deaths were an impetus behind recent congressional action on the regulatory practices for compounding pharmacies.

The Apothecary Shoppe has been cited in the past as well: one disciplinary action in 2006 and several warnings from the Oklahoma Board of Pharmacy.

The warnings are for a few different deficiencies, one of which is creating a drug that is essentially a copy of an FDA-approved drug.

FINAL ORDER

1. Clear and convincing evidence establishes that Respondent Deril J. Lees is guilty on Counts I and II and Respondent The Apothecary Shoppe-Tulsa is guilty on Count III.
2. Respondent Deril J. Lees is hereby ordered to pay a fine of one thousand dollars (\$1000.00) for each count for a total fine of three thousand dollars (\$3000.00).
3. Respondent Deril J. Lees is further ordered to attend an approved one-day law seminar in the year 2006 over and above the fifteen (15) hours of continued education required for that year.

(https://vpnwst.fd.org/p/kwmu/files/201402/Danalinfo-mediad.publicbroadcasting.net+Screen_Shot_2014-02_at_11.57.50_AM.png)
[Enlarge image](https://vpnwst.fd.org/p/kwmu/files/201402/Danalinfo-mediad.publicbroadcasting.net+Screen_Shot_2014-02_at_11.57.50_AM.png) (https://vpnwst.fd.org/p/kwmu/files/201402/Danalinfo-mediad.publicbroadcasting.net+Screen_Shot_2014-02_at_11.57.50_AM.png)

The board took disciplinary action in 2006, finding head pharmacist and owner Deril

Case 2:12-cv-04209-BP Document 353 Filed 02/18/14 Page 302 of 331

<https://vpnwst.fd.org/post/Danalinfo-news.stlpublicradio.org+after-supplying-three-missouri-executions-pharmacy-plans-register-state>

Lees guilty of increasing the quantity of drugs dispensed. According to the Board of Pharmacy, "The staff pharmacists were also instructed to shred the original prescriptions."

In court filings over the past few months, Missouri has argued that the identity of the supplier must be kept secret. The Department of Corrections changed the protocol to hide the identity, a move Gov. Jay Nixon and Attorney General Chris Koster both supported.

The state has argued that if the Apothecary Shoppe's identity got out, the pharmacy wouldn't want to supply for executions anymore. The Apothecary Shoppe did not respond to a request for comment on whether or not they intend to continue.

Missouri's next execution is scheduled for Feb. 26.

Follow Chris McDaniel on Twitter: [@csmcdaniel](https://twitter.com/csmcdaniel)
<https://vpnwest.fd.org/.DanaInfo=twitter.com+csmcdaniel>

Apothecary Shoppe Disciplinary Action

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**Popke** • 15 days ago

The statement by Tony Rothert of the ACLU is absurd as to if the pharmacy is licensed in Missouri then the public may be able to be sure of the quality of the drug being used by Missouri. Mr. Rothert, Missouri has executed 3 murderers in the past three months and the longest time taken for the murderer to be pronounced dead was 9 min. I would think that should be sufficient for your ACLU and the general public as I'm sure no victims died in that short of time.

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**BEFORE THE STATE BOARD OF PHARMACY
STATE OF OKLAHOMA**

IN THE MATTER OF THE)
COMPLAINT AGAINST:)
)
Deril J. Lees, D.Ph. #9635;) Case No. 779
The Apothecary Shoppe -Tulsa (2-4226))
3707 E. 51st St.)
Tulsa, OK 74135)

FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL ORDER

This matter came for hearing on March 8, 2006, before the Oklahoma State Board of Pharmacy ("Board"). Board members Osborn, Richards, Spoon, Lassiter, Gourley and Hampton were present. President Osborn presided. Brinda K. White, Assistant Attorney General, served as prosecutor for the Board. Respondent Deril J. Lees appeared without counsel.

The Complaint in this matter is incorporated into this order by reference.

The Board hereby issues these Findings of Fact, Conclusions of Law and Final Order.

FINDINGS OF FACT

1. Respondent Deril J. Lees is a licensed pharmacist and owns and holds a pharmacy license for Respondent The Apothecary Shoppe - Tulsa in Tulsa, OK.
2. Respondent Lees is the pharmacy manager for Respondent The Apothecary Shoppe - Tulsa.
3. Respondent Lees established a policy instructing the staff pharmacists to increase the quantity dispensed on Promethazine and Tetracaine prescriptions for patients with certain insurance coverage without obtaining authorization from the prescribing physician. The staff pharmacists were also instructed to shred the original prescriptions.

4. RX 185220, the original hard copy of the prescription, was prescribed for patient MW by Dr. Melita Tate for tetracaine lollipop with a quantity of two. RX185219, the telephone-order prescription for the same patient, showed the quantity of the tetracaine increased to ten.

5. RX185282, the original hard copy of the prescription, was prescribed for patient RY by Dr. Melita Tate for tetracaine lollipop with a quantity of four. The prescription label shows that it was filled for a quantity of ten without authorization by the physician.

6. RX185529, the original hard copy of the prescription, was prescribed for patient DW by Dr. Anthony Loehr for tetracaine sucker with a quantity of four. The prescription label shows that it was filled for a quantity of eight without authorization by the physician.

7. Additional prescriptions were filled with an increased quantity without documentation of physician authorization for the increase.

8. Title 59 O.S. § 353.24(1) provides that it is unlawful to increase the quantity of drugs in any prescription.

9. Respondent Lees established a policy instructing the staff pharmacists to reward customer loyalty by reducing third party copays.

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter and over the Respondent pursuant to 59 O.S.Supp.2005, §§ 353.7 and 353.26.

2. Any Finding of Fact which is properly a Conclusion of Law is hereby incorporated by reference and vice versa.

3. Respondent Deril J. Lees has violated 59 O.S. § 353.26(A)(1)(h) by exercising conduct and habits inconsistent with the rules of professional conduct established by the Board, as

set forth in Count I of the Complaint.

4. Respondent Deril J. Lees has violated OAC 535:10-3-1.1(1) by failing to conduct business as a pharmacist in conformity with all federal, state and municipal laws, as set forth in Count II of the Complaint.

5. Respondent The Apothecary Shoppe-Tulsa has violated OAC 535:15-3-2(b)(1)(A) by failing to have a pharmacy manager who was responsible for all aspects of the operation related to the practice of pharmacy, including the supervision of all employees as they relate to the practice of pharmacy, as set forth in Count III of the Complaint.

6. Pursuant to 59 O.S.Supp.2005, §353.7(11), the Board has authority to levy fines not to exceed One Thousand Dollars (\$1000.00) for each violation, to reprimand, place on probation or suspend or revoke the permit of a registrant who violates any provision of the Oklahoma Pharmacy Act including the Board's rules.

7. Based on the above Findings of Fact, Respondent is subject to disciplinary action pursuant to 59 O.S.Supp.2005, §§ 353.7 and 353.26.

FINAL ORDER

1. Clear and convincing evidence establishes that Respondent Deril J. Lees is guilty on Counts I and II and Respondent The Apothecary Shoppe-Tulsa is guilty on Count III.

2. Respondent Deril J. Lees is hereby ordered to pay a fine of one thousand dollars (\$1000.00) for each count for a total fine of three thousand dollars (\$3000.00).

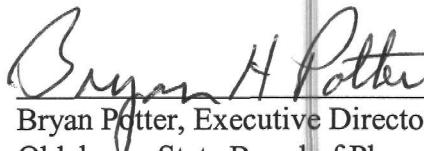
3. Respondent Deril J. Lees is further ordered to attend an approved one-day law seminar in the year 2006 over and above the fifteen (15) hours of continued education required for that year.

4. Respondent Deril J. Lees is directed to view and require all staff pharmacists working for him to view an error correction video.

5. A letter of reprimand shall be placed in Respondent Deril J. Lees's file for one year beginning March 8, 2006.

6. Failure of Respondent Deril J. Lees to abide by any of the terms of this Order could result in suspension or revocation of his license or in any other disciplinary action allowed by the Oklahoma Pharmacy Act and the Board's rules.

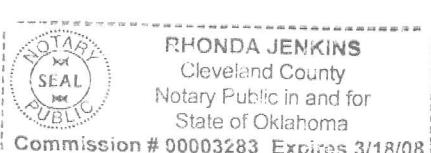
All participating members vote "Aye".



Bryan H. Potter, Executive Director
Oklahoma State Board of Pharmacy

State of Oklahoma)
) ss.
County of Oklahoma)

Subscribed and sworn before me on this 13th day of March, 2006.





Rhonda Jenkins
Notary Public

OKLAHOMA STATE BOARD OF PHARMACY

4545 Lincoln Blvd, Ste 112, Oklahoma City, OK 73105-3413

Phone: 405-521-3815 / Fax: 405-521-3758

WARNING NOTICE ISSUED TO PHARMACY

Date: 16 FEB 2012 Time: 12:50PM Lic. No.: 2-5497

Name of Pharmacy (as shown on license):

THE APOTHECARY SHOPPE

6136 E 51ST STREET, TULSA, OK 74135
(number and street) (city) (zip)

DERIL JAMES LEES, JR PIC/MANAGER, 14294
(name of person responsible for violation) (reg. no.)

Notice is hereby given that you are not complying with the laws and/or rules and the regulations and/or policies pertaining to the practice of pharmacy as follows:

VIOLATION OF OAC 535:15-10-12 Compounding for a prescriber's

office use(c)THE PREPARATION IS TO BE ADMINISTERED IN THE
OFFICE AND NOT DISPENSED TO THE PATIENT. THE PREPARATION
LABEL SHOULD STATE "FOR OFFICE USE ONLY-NOT FOR RESALE"

VIOLATION OF OAC 535:15-10-8 Drug Compounding Controls

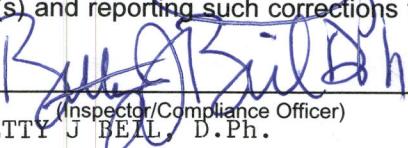
(h) General Requirements: (1) Compounding a drug product
that is commercially available in the marketplace or that
is essentially a copy of an available FDA-approved drug
is generally prohibited unless patient therapy is
compromised

***#26068 for RECORD KEEPING**

COMPOUNDED PREPARATION FLUOROURACIL 5% EM CR 5GM SOLD TO
TULSA DERMATOLOGY CLINIC on 01/03/2012 . The COMPOUNDED
PRODUCT WAS SOLD TO THE CLINIC AS A 240GM SIZE ZIPLOCK
BAGGY CONTAINING#48 5GM TUBES. THE LABEL ON THE ZIPLOCK
BAG DID NOT CONTAIN THE REQUIRED -NOT FOR RESALE-LANGUAGE
Additionally, THE 5GM TUBES INSIDE THE BAG DID NOT CARRY
ANY LANGUAGE STATING "FOR OFFICE USE ONLY-NOT FOR RESALE"
FLUOROURACIL 5% CREAM IS COMMERCIALLY AVAILABLE

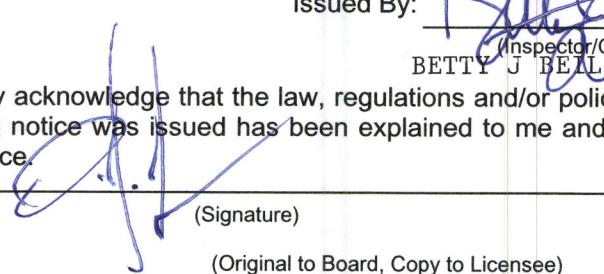
The above violation(s) may be used as the basis for reprimand, probation, revocation and/or suspension of your license. You have 10 days to show compliance by correcting the noted violation(s) and reporting such corrections to the Board **IN WRITING**.

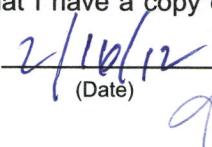
Issued By:


(Inspector/Compliance Officer)

BETTY J. BELL, D.Ph.

I hereby acknowledge that the law, regulations and/or policy on which the above warning notice was issued has been explained to me and that I have a copy of this notice.


(Signature)


(Date)

(Original to Board, Copy to Licensee)

The Apothecary Shoppe

COMPOUNDING PHARMACY

6136 E 51st Street
Tulsa, OK 74135
(918) 665-2003

February 21, 2012

RECEIVED

FEB 23 2012

**OK STATE BOARD
OF PHARMACY**

Oklahoma State Board of Pharmacy
Attn: John Foust, Pharm.D., Executive Director
4545 Lincoln Blvd, Ste 112
Oklahoma City, OK 73105-3413

Dr. Foust,

This letter is in response to the warning notice issued by Inspector Betty Beil on 02/16/2012. I understand the law that governs this type of practice and we have not knowingly engaged in the selling of office use prescriptions that are sold or dispensed out of Doctors' offices for profit. We received a prior warning notice dated 01/25/12, and my position has not changed. I consider the first warning to be as one and the same as this "violation" seeing as the last time the "offending prescription" was dispensed was prior to my clarification of the law "Not for Resale" be stated. Prior to Inspector Beil's initial visit, we have dispensed compounded prescriptions to clinics labeled "For Office Use Only". Inspector Beil informed us that the statement "Not for Resale" is also required. We have taken corrective measures to ensure this violation does not occur again.

The second issue on this warning notice that this prescription of Fluorouracil 5% compounded into an emollient cream base is a copy of a commercially available product, however that claim is not valid. The doctors at this clinic have asked us to compound this cream using an emollient base due to the nature of the skin that this medication be applied, being that this base will provide a comedogenic effect. It is incorrect to state that a commercially available product could be substituted. Patient therapy would be compromised if the commercial product were dispensed.

The third and final issue on this warning notice that the individual tubes contained within the prescription "baggie" were not individually labeled with "For Office Use Only-Not for Resale" is an issue that we are working to correct. The prescription was dispensed with an appropriate "For Office Use Only" label on the delivered contents, due to us not being aware at the time of dispensing "Not For Resale" was left off. We will make corrections that individually packaged products independent of our

The Apothecary Shoppe

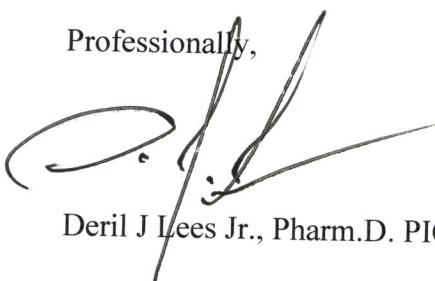
COMPOUNDING PHARMACY

6136 E 51st Street
Tulsa, OK 74135
(918) 665-2003

prescription label will contain "For Office Use Only-Not For Resale" on each label. These packages are broken down to make it easy to have the product in each exam room.

We are not engaged in this type of practice and have been approached by several groups of physicians to compound medications for resale in their offices and to copy manufactured products for less cost, and we always decline. It is my viewpoint that prescriptions should be dispensed by the pharmacy to the patient and this clinic has obliged. In regards to the above referenced violation, the preparation was dispensed in the requested dispensing device so it may be easily used for administration prior to various procedures.

Professionally,



Deril J Lees Jr., Pharm.D. PIC. State License 14294

OKLAHOMA STATE BOARD OF PHARMACY
4545 Lincoln Blvd, Ste 112, Oklahoma City, OK 73105-3413
Phone: 405-521-3815 / Fax: 405-521-3758

WARNING NOTICE

ISSUED TO PHARMACY

Date: 25 JAN 2012 Time: 11:09AM Lic. No.: 2-5497

Name of Pharmacy (as shown on license):

THE APOTHECARY SHOPPE

6136 E 51st STREET, TULSA, OK 74135
(number and street) (city) (zip)

DERIL JAMES LEES, Jr, 14294
(name of person responsible for violation) (reg. no.)

Notice is hereby given that you are not complying with the laws and/or rules and the regulations and/or policies pertaining to the practice of pharmacy as follows:

VIOLATION OF OAC 535:15-10-12. Compounding for a prescriber's office use(c) THE PREPARATION IS TO BE ADMINISTERED IN THE OFFICE AND NOT DISPENSED TO THE PATIENT. THE PREPARATION LABEL SHOULD STATE "FOR OFFICE USE ONLY-NOT FOR RESALE."

20. 10. 4%
COMPOUNDED PREPARATION BENZO-LIDO-TETRA CREAM SOLD TO DR JEFF ALEXANDER, M.D., DERMATOLOGIST LOCATED AT 6565 S YALE IN TULSA, OKLAHOMA. THE COMPOUNDED PRODUCT, CONTAINED PRESCRIPTION ONLY INGREDIENTS, WAS PURCHASED BY A PATIENT FOR SELF-ADMINISTRATION. THE LABEL DID NOT CONTAIN THE REQUIRED "FOR OFFICE USE ONLY-NOT FOR RESALE" LANGUAGE ON THE PREPARATION'S LABEL IN VIOALTION OF

ABOVE. [LotNo. 09272010 BUD 03/26/2011]

The above violation(s) may be used as the basis for reprimand, probation, revocation and/or suspension of your license. You have 10 days to show compliance by correcting the noted violation(s) and reporting such corrections to the Board **IN WRITING**.

Issued By:

Betty J. Beil
(Inspector/Compliance Officer)

Betty J. Beil, D.Ph.

I hereby acknowledge that the law, regulations and/or policy on which the above warning notice was issued has been explained to me and that I have a copy of this notice.

D.J.L.
(Signature)

14294

1/25/12
(Date)

(Original to Board, Copy to Licensee)

The Apothecary Shoppe

COMPOUNDING PHARMACY

6136 E 51st Street
Tulsa, OK 74135
(918) 665-2003

RECEIVED

JAN 30 2012

OK STATE BOARD
OF PHARMACY

January 27, 2012

Oklahoma State Board of Pharmacy
Attn: John Foust, Pharm.D., Executive Director
4545 Lincoln Blvd, Ste 112
Oklahoma City, OK 73105-3413

Dr. Foust,

This letter is in response to the warning notice issued by Inspector Betty Beil on 01/25/2012. I understand the law that governs this type of practice and we have not knowingly engaged in selling office use prescriptions to be sold or dispensed out of Doctors offices for profit. Prior to Inspector Beil's visit, we have dispensed compounded prescriptions to clinics labeled "For Office Use Only". Inspector Beil informed us that the statement "Not for Resale" is also required. We have taken corrective measures to ensure this violation does not occur again.

Further, we were not aware that physicians were reselling office use products dispensed by our pharmacy. In addition to updating our prescription label, we are communicating with all of the doctor's offices that we supply compounded prescriptions to, and we are ensuring the physicians are aware of this law.

We are not engaged in this type of practice and have been approached by several groups of physicians to compound medications for resale in their offices, and we always decline. It is my viewpoint that prescriptions should be dispensed by the pharmacy to the patient. In regards to the above referenced violation, the preparation was dispensed in the requested dispensing device so it may be easily used for administration prior to various procedures.

Professionally,

Deril J Lees Jr., Pharm.D. PIC. State License 14294

EXHIBIT J

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 13-3664

David Zink, et al.

Allen L. Nicklasson

Appellant

John C. Middleton, et al.

v.

George A. Lombardi, et al.

Appellees

Appeal from U.S. District Court for the Western District of Missouri - Jefferson City
(2:12-cv-04209-NKL)

AMENDED ORDER

The petition for rehearing en banc, the petition for rehearing by panel and the motion for stay of execution are denied as moot. Judge Duane Benton did not participate in the consideration or decision of this matter.

BYE, Circuit Judge, with whom KELLY, Circuit Judge, joins, dissenting.

At approximately 10:52 p.m. on December 11, 2013, Missouri executed Allen Nicklasson before this court had completed its review of Nicklasson's request for a stay of his execution, a request he brought in a pending action challenging the constitutionality of Missouri's execution protocol. That bears repeating. Missouri put Nicklasson to death before the federal courts had a final say on whether doing so violated the federal constitution.

Missouri has a well-documented history of attempting to execute death row inmates before the federal courts can determine the constitutionality of the executions. In 1983, Missouri set an execution date for Doyle Williams before the time had run for Williams to petition the Supreme Court for direct review of his conviction and death sentence. Supreme Court Justice Harry Blackmun stayed the execution, specifically advising Missouri that a "defendant must have at least one opportunity to present to the [Supreme Court] his claims that his death sentence has been imposed unconstitutionally." Williams v. Missouri, 463 U.S. 1301, 1301-02 (1983).

Just a few months later, however, Missouri set the execution dates of four death row inmates – Samuel Lee McDonald, Leonard Marvin Laws, Thomas Henry Battle, and George Clifton Gilmore – before the time had run for the filing and disposition of a petition for certiorari on direct review of the men's convictions and death

sentences. In the order entering a stay of the executions, Justice Blackmun unequivocally stated that

[e]very defendant in a state court of this Nation who has a right of direct review from a sentence of death, no matter how heinous his offense may appear to be, is entitled to have that review before paying the ultimate penalty. The right of review otherwise is rendered utterly meaningless. It makes no sense to have the execution set on a date . . . before [judicial] review is completed.

McDonald v. Missouri, 464 U.S. 1306, 1307 (1984).

Additionally, Justice Blackmun reminded Missouri of what he said in Williams:

I thought I had advised the Supreme Court of Missouri once before, in Williams, that, as Circuit Justice of the Circuit in which the State of Missouri is located, I, upon proper application, shall stay the execution of any Missouri applicant whose direct review of his conviction and death sentence is being sought and has not been completed. I repeat the admonition to the Supreme Court of Missouri, and to any official within the State's chain of responsibility, that I shall continue that practice. *The stay, of course, ought to be granted by the state tribunal in the first instance, but, if it fails to fulfill its responsibility, I shall fulfill mine.*

Id. (emphasis added).

Thirteen months after Justice Blackmun's admonition, Missouri set an execution date for Walter Junior Blair. Prior to his execution date, Blair had filed a

petition for writ of habeas corpus in federal district court. Blair then filed a motion with the Missouri Supreme Court requesting a stay of his execution to give him a meaningful opportunity to exercise his constitutional right of federal habeas review. The Missouri Supreme Court nonetheless summarily denied the request for a stay. A federal district court was thus required to step in and stay the execution. See Blair v. Armontrou, 604 F. Supp. 723, 723 (W.D. Mo. 1985). In so doing, the court noted that

[b]y refusing the petitioner's request for a stay of execution, the Missouri Supreme Court has in effect authorized the execution of a condemned prisoner without affording him the opportunity to exercise his constitutional right of federal habeas corpus review. In so doing, the Missouri Supreme Court ignored its responsibility to stay executions while federal judicial review is pending.

Id. at 724. The district court reiterated the admonitions Justice Blackmun had given Missouri in Williams and McDonald, and expressly held "[a] state prisoner sentenced to death is constitutionally entitled to habeas corpus review," id. at 725, adding that the principle of comity (i.e., federal courts first affording states the opportunity to perform their constitutional duties) "will be jeopardized if the Missouri Supreme Court continues to ignore its well-defined responsibility concerning requests for stays of execution due to pending federal review. Since the Missouri Supreme Court has failed to accept its responsibility, I shall accept mine." Id.

Less than a year after Blair, Missouri set January 6, 1986, as the execution date for Gerald M. Smith. At the time, Smith was a death row inmate whose competency was in question based upon his indecision about whether to pursue available state and federal remedies attacking his conviction and death sentence, or abandon his legal proceedings and proceed with his execution. Smith's brother, Eugene Smith, filed a next-friend petition in a Missouri state court seeking a determination of his brother's competency before Missouri proceeded with the execution; Eugene also filed a motion in the Missouri Supreme Court to stay the execution until his brother's competency could be determined. The Missouri Supreme Court summarily denied the request for a stay "in one line and without any explanation." Smith By and Through Smith v. Armontrot, 626 F. Supp. 936, 938 (W.D. Mo. 1986). After Eugene obtained a ruling in the state trial court that his next-friend petition was a valid action under Missouri law, the Missouri Supreme Court postponed the execution for nine days, but ultimately "issued an order which, in effect, stated that the next-friend [proceeding] . . . was a legal nullity and that no further extensions of Gerald Smith's execution date would be granted." Id.

Once again, a Missouri litigant was required to turn to the federal courts to ensure that Missouri complied with constitutional requirements mandated by the United States Supreme Court before carrying out an execution. See Rees v. Peyton,

384 U.S. 312, 313-14 (1966) (explaining the competency procedures which any court of this nation, state or federal, must follow when a death row inmate announces an intention to abandon further appeals and proceed with an execution). In staying Missouri's execution of Gerald Smith until his competency could be determined, the federal district court stated "it becomes painfully obvious that the Missouri Supreme Court's refusal to stay Gerald Smith's execution pending a competency determination . . . had no basis in fact nor in law, but was merely an expedient way of washing its hands of the matter and passing the buck to the Federal courts." Smith, 626 F. Supp. at 940. The district court further noted "[t]his is not the first time that the Missouri Supreme Court has passed the buck to the Federal courts by refusing to perform its legal obligation to stay an execution . . . when the law required a stay to permit post-conviction appeals to be heard in an orderly manner," id., and referred to the prior Williams, McDonald, and Blair cases.

The district court also commented on the necessary and inevitable tension which exists between a state's choice to utilize death as a penalty on one hand, and the safeguards our Founding Fathers saw fit to include in our federal constitution on the other:

This Court is aware that many members of the public are frustrated with what seems to be inordinate delay in the processing of appeals by death row inmates. Indeed, many people believe that there should be no appeals whatsoever following the jury's imposition of the death

sentence. *The law, on the other hand, provides that certain procedures must be followed before a death sentence may be carried out.* Although it may not win a popularity contest in any given case, this scheme was adopted to ensure that *every individual would be accorded due process of law.*

Id. at 940 n.3 (emphasis added).

In May 2005, Missouri death row inmate Vernon Brown challenged the three-chemical protocol Missouri used in its executions at the time. Brown was one of the first death row inmates to participate in what subsequently became a multi-state challenge to this three-chemical protocol, incited in large part by the publication of an April 2005 article in the medical journal *The Lancet*. The article analyzed autopsy toxicology results from forty-nine executions where the three-chemical sequence of sodium pentothal¹ (a sedative), pancuronium bromide (a paralytic), and potassium chloride (a very painful drug which induces a heart attack) was used to carry out the executions. The article's authors essentially concluded that in almost half of the autopsies examined (43%), the amount of sedative used in the executions would have been insufficient to render the inmate unconscious. "In other words, the use of this three-chemical sequence results in a possibility the person to whom it is administered will be conscious when the inherently painful potassium chloride takes effect, yet no one will know because of the paralytic effects of the pancuronium

¹Sodium pentothal is sometimes referred to as thiopental.

bromide." Brown v. Crawford, 408 F.3d 1027, 1028 (8th Cir. 2005) (Bye, J., dissenting). The evidence Brown asked us to consider included the fact that nineteen states had passed laws banning the use of a similar protocol to euthanize animals. Brown alleged Missouri is "using a combination of chemicals they knew or should have known would cause an excruciating death when they were telling the public it was like putting a dog to sleep, when their own veterinarians would lose their licenses for using the same chemicals on a stray." Id. (quoting Brown v. Crawford, No. 4:05-VV-746-CEJ, Motions for Temporary Restraining Order at 19).

The article in *The Lancet* had been published just a month before Brown's execution date. He relied upon it to bring an eleventh-hour challenge to his execution, merely asking Missouri to disclose the level of sodium pentothal it would use in his execution before executing him – hardly an onerous request. In refusing to disclose information about the dosage levels used in its execution protocol, Missouri trumpeted the need to proceed with Brown's execution post haste in order to provide the families of the victims of his crimes with closure. Against my dissent, the Eighth Circuit said Missouri could execute Brown without first disclosing whether its protocol utilized an adequate dosage of sodium pentothal. Brown was strapped to a gurney at 11:30 p.m., and left there for three hours before a divided Supreme Court finally denied his request for a stay and allowed Missouri to proceed with his execution.

Missouri death row inmate Michael Anthony Taylor also challenged Missouri's use of the three-chemical protocol. In more reflective deliberations not burdened by the eleventh-hour nature of Vernon Brown's challenge, the federal courts handling Taylor's suit understandably recognized he, along with other Missouri death row inmates, were entitled to know the dosage levels Missouri used in its execution protocol before Missouri could execute them.

Taylor discovered numerous and significant problems with Missouri's execution protocol, including inconsistencies between the amounts of sodium pentothal Missouri claimed to be using in every execution, and chemical dispensary logs which showed much lower amounts of the sedative actually being used in several executions. See Taylor v. Crawford, No. 05-4173-CV-C-FJG, 2006 WL 1779035, at *3 (W.D. Mo. June 26, 2006). Incredibly, Missouri had not adopted a written protocol for its executions. Even more incredibly, Missouri gave unfettered discretion to an *admittedly dyslexic physician* to implement the state's unwritten protocol, *including the responsibility of correctly mixing the drugs used in executions*. Id. at *4-8. The district court's observations bear repeating here:

After learning more about how executions are carried out in Missouri, through the interrogatories submitted to the John Doe defendants, reviewing the chemical dispensary logs, reviewing the videotape of the execution chamber and listening to the testimony of John Doe I, and to the testimony of the other expert witnesses at the June 12-13, 2006 hearing, it is apparent that there are numerous problems. For example,

there is no written protocol which describes which drugs will be administered, in what amounts and defines how they will be administered. John Doe I testified that he came up with the current protocol. John Doe I also testified that he felt that he had the authority to change or modify the formula as he saw fit. It is apparent that he has changed and modified the protocol on several occasions in the past. He has reduced the amount of thiopental given from 5.0 grams to 2.5 grams and has also changed the location on the inmate's body where the drugs were administered. It is obvious that the protocol as it currently exists is not carried out consistently and is subject to change at a moment's notice.

The Court is also concerned that John Doe I possesses total discretion for the execution protocol. Currently, there are no checks and balances or oversight, either before, during or after the lethal injection occurs. No one monitors the changes or modifications that John Doe I makes. John Doe I even testified that the Director of the Department of Corrections, Mr. Crawford, has no medical or corrections background, and that he is "totally dependent on me advising him." (John Doe Depo. p. 64).

In addition to the fact that there is no oversight and the responsibility for making changes or adjustments is completely vested in one individual, the Court also has concerns about John Doe I's qualifications. John Doe I readily admitted that he is dyslexic and that he has difficulty with numbers and oftentimes transposes numbers. John Doe I testified "it's not unusual for me to make mistakes. . . . But I am dyslexic and that is the reason why there are inconsistencies in my testimony. That's why there are inconsistencies in what I call drugs. I can make these mistakes, but it's not medically crucial in the type of work I do as a surgeon." (John Doe Depo. p. 25). The Court disagrees and is gravely concerned that a physician who is solely responsible for correctly mixing the drugs which will be responsible for humanely ending the life of condemned inmates has a condition which causes him confusion with regard to numbers. As the Court has learned, the process of mixing the three different drugs and knowing the correct amount of the drugs to dissolve in the correct amount of solution involves precise measurements and the ability to use, decipher, and not confuse numbers. Although John Doe I does not feel this is crucial in the type of work he does as a surgeon, it

is critical when one is mixing and dissolving chemicals for a lethal injection.

In addition, John Doe I testified that although he is not an anesthesiologist, he monitors the anesthetic depth of an inmate by observing the inmate's facial expression. However, as can be seen from the videotape of the execution chamber, when the inmate is lying on the gurney in the execution room, the inmate is facing away from the Operations room where John Doe I is located. Additionally, it is dark in the Operations room and there are blinds on the window which are partially closed and obstruct the view. This would make it almost impossible for John Doe I to observe the inmate's facial expression. This leads the Court to conclude that there is little or no monitoring of the inmate to ensure that he has received an adequate dose of anesthesia before the other two chemicals are administered.

Id. at *7-8. The district court ultimately concluded "Missouri's lethal injection procedure subjects condemned inmates to an unnecessary [and unacceptable] risk that they will be subject to unconstitutional pain and suffering when the lethal injection drugs are administered." Id. at *8. The district court ordered Missouri to prepare a new written protocol for the implementation of lethal injections to ensure compliance with the federal constitution. Id. The Eighth Circuit vacated the injunction entered by the district court to prevent Missouri from proceeding with any executions only after Missouri adopted a detailed written execution protocol, and indicated it would no longer use the services of the dyslexic physician. See Taylor v. Crawford, 487 F.3d 1072, 1077 n.3, 1082-85 (8th Cir. 2007).

II

With this history of Missouri's implementation of the death penalty in mind, I turn to Allen Nicklasson's now-moot challenge to Missouri's more recent, ever-changing execution protocol. Allen Nicklasson was one of a number of Missouri death row inmates who filed suit raising constitutional challenges against an execution protocol Missouri announced on May 15, 2012. The new protocol would utilize just a single drug, propofol, to carry out executions. The inmates filed their lawsuit in Missouri state court, but Missouri's choice to remove it triggered our federal review.

The inmates' challenge to Missouri's execution protocol is no longer about the use of propofol because Missouri has changed the protocol numerous times since May 2012, while still actively scheduling new executions. Joseph Franklin was also one of the death row inmates participating in this constitutional challenge to Missouri's execution protocol. Missouri scheduled, and completed, Franklin's execution on November 20, 2013, notwithstanding the fact it changed the execution protocol no less than five times between August 1, 2013, and November 20, 2103, with the last protocol change occurring just five days before Franklin was executed.

The issues currently involved in this protocol litigation include the fact that Missouri is resorting to secret compounding pharmacies to concoct copycat versions

of the drug pentobarbital to carry out its executions. Applying Hill v. McDonough, 547 U.S. 573 (2006), the district court presiding over the protocol litigation entered a stay of Franklin's execution after concluding the inmates showed "a significant likelihood of success on the merits, a showing of irreparable harm in contrast to relatively little harm to [Missouri], and no fault in the delay of their current case pending before this Court." Zink v. Lombardi, No. 2:12-CV-4209-NKL, 2013 WL 6080358, at *8 (W.D. Mo. Nov. 19, 2013).

With respect to the moving target Missouri kept presenting to the inmates by constantly changing its execution protocol while still going forward with Franklin's execution (and now Nicklasson's), the district court said

[death penalty] litigation is not a game of chess. Hill was intended to be a shield to protect defendants from abusive litigation practices by death row inmates. But it was never intended to be used as a sword permitting defendants to disrupt and delay the litigation process and then complain that time is up. Neither the Plaintiffs nor the Court have been able to address the merits of Plaintiffs' claim that the Defendants have adopted an execution protocol that violates the U.S. Constitution, because the Defendants keep changing the protocol that they intend to use. It would be a substantial departure from the way in which law suits are generally handled by this Court, to allow Defendants to succeed with this strategy. Rather, the pending dispute between the parties should be resolved on the merits after a reasonable opportunity for both sides to be heard, followed by a prompt, final order resolving the dispute. That is how it is normally done in America and it is a system that has worked quite well.

Id. at *6.

I agreed with the district court's analysis and voted to stay Franklin's execution. Although a majority of my colleagues disagreed, and Franklin was allowed to be executed, I still agree with the district court's analysis, which is why I voted to stay Nicklasson's execution as well.

My point, however, in this dissent from the denial of the petition for rehearing en banc of Nicklasson's request for a stay, is not to discuss or rehash the merits of the current protocol litigation. Rather, I feel obliged to say something because I am alarmed that Missouri proceeded with its execution of Allen Nicklasson before this court had even finished voting on Nicklasson's request for a stay. In my near fourteen years on the bench, this is the first time I can recall this happening. In litigation raising a constitutional challenge to his execution, a death row inmate sought a stay of his execution under Hill, and before the federal courts had issued a final decision on the pending request for a stay, Missouri carried out the execution.

While the current protocol litigation is not among the category of cases for which Nicklasson was entitled to an automatic stay of his execution, it was nonetheless a claim that Missouri would violate the federal constitution by executing him. As a result, Nicklasson was entitled to have this court complete its equitable review under Hill to determine whether he was entitled to a stay before Missouri

actually executed him. By proceeding with Nicklasson's execution before our court had completed voting on his petition for rehearing en banc, Missouri violated the spirit, if not the letter, of the long litany of cases warning Missouri to stay executions while federal review of an inmate's constitutional challenge is still pending.

III

Missouri's past history of scheduling executions before a death row inmate has exhausted his constitutional rights of review, using unwritten execution protocols, misrepresenting dosage levels for drugs used in lethal injections, and providing unfettered discretion to a dyslexic physician to mix the drugs and oversee its executions, has earned from this federal judge more than just a healthy judicial skepticism regarding Missouri's implementation of the death penalty. Its current practice of using shadow pharmacies hidden behind the hangman's hood, copycat pharmaceuticals, numerous last-minute changes to its execution protocol, and finally, its act of proceeding with an execution before the federal courts had completed their review of an active request for a stay, has committed this judge to subjecting the state's future implementation of the penalty of death to intense judicial scrutiny, for the sake of the death row inmates involved as well as adversaries and advocates of capital punishment alike.

December 23, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit
/s/Michael E. Gans

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to counsel for defendants, who are registered CM/ECF users here.

s/ Matthew B. Larsen
MATTHEW B. LARSEN